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Supreme Court of the United States

AVA HEYDT-BENJAMIN,

Petitioner,

v.

THOMAS HEYDT-BENJAMIN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. Under the Convention, U.S. courts are required to return a child who has been wrongfully removed from her country of "habitual residence." The courts of appeals are divided three ways over the definition of "habitual residence." The question presented is:

What is the test for determining a child's country of habitual residence for purposes of the Convention?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ava Heydt-Benjamin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-5a) is unpublished but is reported at 2010 WL 5294639 (2d Cir. Dec. 28, 2010). The Second Circuit's order denying rehearing en banc (Pet. App. 27a) is unreported, as is the opinion of the district court (Pet. App. 7a-26a).

JURISDICTION

The Second Circuit issued its decision on December 28, 2010 (Pet. App. 1a-5a) and denied rehearing en banc on March 2, 2011 (Pet. App. 27a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Hague Convention on the Civil Aspects of International Child Abduction (Pet. App. 87a-90a) and the International Child Abduction Remedies Act (Pet. App. 91a-95a) are reproduced in the Petition Appendix.

STATEMENT OF THE CASE

This case presents an important question of child abduction law over which the federal courts of appeals and state courts are intractably divided: the test to be used to determine a child's "habitual residence" for purposes of the Hague Convention on

the Civil Aspects of International Child Abduction. Because the Hague Convention offers relief only when a child has been abducted from his habitual residence to another signatory state, this threshold question goes to the heart of the Convention.

1. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 ("Hague Convention" or "Convention"), to which the United States is a signatory, was enacted in response to a rise in international abductions by parents seeking a more advantageous forum in which to litigate custody disputes. *See* 42 U.S.C. § 11601(a)(3); *Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010). The Convention aims "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Hague Convention preamble. The International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq., implements the Convention.

The Convention seeks to deter child abductions by depriving an abductor of any jurisdictional advantage in a subsequent custody dispute. *See* Hague Convention art. 12; *see also* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ("Pérez-Vera Report"), *in* ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, TOME III, at 429 (1980).[1] To this end, if a parent

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[1] As this Court recognized in *Abbott*, the Pérez-Vera Report is the "official history for the Convention and a source of background on the meaning of the provisions of the Convention

wrongfully removes a child from the child's country of "habitual residence," the Convention requires the automatic return of the child (subject to certain exceptions not before this Court), so that courts in the child's country of habitual residence can resolve any custody disputes. Hague Convention arts. 3, 12.

2. Petitioner Ava Heydt-Benjamin and respondent Thomas Heydt-Benjamin were married in June 2003. Pet. App. 11a. In summer 2004, the couple moved to Massachusetts so that respondent could pursue graduate studies. *Id.* Their daughter, I.H.-B., was born in Massachusetts in December 2005. *Id.*

In summer 2007, the family traveled to Zurich, Switzerland so that respondent could begin a three-month internship with IBM. Pet. App. 11a. While there, respondent was accepted into a three-year Ph.D program at the Swiss Federal Institute of Technology in Zurich and was offered ongoing employment with IBM. *Id.* The couple's son, L.H.-B., was born in Zurich in September 2007. *Id.*

In November 2007, the family returned briefly to the United States to prepare for its move to Switzerland. Pet. App. 11a. Petitioner and respondent put their furniture in storage, emptied respondent's office, and shipped a variety of household goods – including computers, clothing, books, musical instruments, toys, and baby supplies – to Zurich. *Id.* 35a, 61a, 65a. At the time of the move

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available to all States becoming parties to it." 130 S. Ct. at 1998 n.1 (quotation marks omitted).

to Switzerland, the family neither owned nor leased a residence in the United States. *Id.* 38a.

In January 2008, petitioner, respondent, and their children returned to Switzerland. Pet. App. 11a. They leased an apartment and furnished it with three thousand dollars' worth of furniture, including dressers, kitchen items, a bed, sofa, crib, television, and numerous other fixtures. *Id.* 20a, 37a-38a, 66a. Petitioner started a play group with local children. *Id.* 43a-45a, 67a. The couple endeavored to learn German, while respondent purchased a motorcycle, joined a rock-climbing club, and occasionally performed at local music clubs. *Id.* 40a-43a, 73a-74a. The family maintained medical insurance in Switzerland, *id.* 43a, and the children received regular check-ups from a Swiss physician, *id.* 46a. The children attended daycare, where they made friends, celebrated birthday parties, and went on field trips. *Id.* 20a, 46a, 54a. Petitioner took the children to visit Swiss museums, public parks, gardens, and community fairs. *Id.* 40a-41a, 54a. Apart from a visit to the United States during parts of July and August 2008, the children lived in Switzerland continuously between January 2008 and January 2010. *Id.* 11a-12a.

During this period, the relationship between petitioner and respondent deteriorated. Pet. App. 12a. In February 2009, petitioner left Switzerland to work temporarily in the United States. *Id.* Although the couple discussed the possibility that the children would accompany her, respondent eventually demanded that they remain in Zurich. *Id.* 20a-21a. In August 2009, respondent filed for divorce. *Id.* 75a.

Upon her return to Switzerland in September 2009, petitioner moved out of the family home. Pet. App. 12a. Because respondent no longer provided her with financial support, *id.* 71a, in October 2009, petitioner again traveled to the United States to take another temporary job. *Id.* 12a. She returned to Switzerland in December 2009 and continued to see the children regularly – both during the day and for overnight visits – through an informal agreement with respondent. *Id.* 12a, 53a, 55a-56a.

While petitioner visited her children frequently throughout January 2010, the informal arrangement with respondent was sufficiently strained that on January 14, 2010, petitioner formally filed an action in Swiss court seeking custody of her children. Pet. App. 4a; Petr. C.A. Br. 15.

On January 19, 2010, respondent's Swiss attorney advised him in an email that petitioner was likely to prevail in the Swiss custody case. Pet. App. 96a-97a. Seven days later, without petitioner's knowledge or consent, respondent fled with the children to his parents' home in New York. *Id.* 12a.

3. On February 4, 2010, petitioner filed this suit in the United States District Court for the Southern District of New York seeking the return of her children to Switzerland pursuant to the Hague Convention and ICARA. Pet. App. 77a-86a. Almost six weeks later, the district court denied relief under the Convention. *Id.* 19a. Although it acknowledged that respondent's abduction of the children was "motivated by forum shopping," *id.* 24a, the court nevertheless concluded that the removal was not "wrongful" within the meaning of the Hague

Convention because the children's habitual residence was the United States. *Id.* 25a.

To reach this conclusion, the district court applied the "shared intent" test employed in the Second Circuit to determine habitual residence. Pet. App. 14a. Under this test, a court inquires into the "shared intent of those entitled to fix the child's residence . . . at the latest time their intent was shared." *Id.* The answer to this question ordinarily resolves the habitual residence determination because there is a presumption that "the shared intent of the parents should control the habitual residence of the child." *Id.* (quoting *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005)).

Based primarily on "credibility determinations" regarding the testimony given by petitioner, respondent, and both of respondent's parents over several days of evidentiary hearings, the court found that petitioner and respondent last shared an intention regarding their children's habitual residence in summer 2007, when the family temporarily resided in Switzerland during respondent's internship. Pet. App. 19a. At that point, the court concluded, the couple shared an intention to return to the United States at the end of the summer; this last shared intent therefore established the United States as the children's habitual residence. *Id.* Moreover, the court explained, although the family had moved to Switzerland in 2008 for respondent to start a three-year graduate program, there could be no mutual intent for the children to reside there because petitioner had apparently expressed some dissatisfaction regarding the move. *Id.* 18a, 22a.

Having decided that the parties' last shared intent occurred in late 2007 and was to fix their children's habitual residence in the United States, the court then considered whether the presumption created by that last shared intent could be rebutted by "evidence [that] unequivocally points to the conclusion that the child[ren] had acclimatized to the new location and thus . . . acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent." Pet. App. 14a, 25a (quoting *Gitter*, 396 F.3d at 134). Although petitioner's son had never lived in the United States, and her daughter had lived there only as an infant, the district court rejected the possibility that the children could have "become more Swiss than American." *Id.* 25a. Instead, the district court reasoned, the children were "in the position, not unlike children raised to parents in the foreign service or the military, who may be spending a few years of their young lives abroad but whose habitual residence is nevertheless, unquestionably, the United States." *Id.*

4. On appeal, the Second Circuit affirmed. Applying the test outlined in *Gitter*, the Second Circuit explained that it found "no error in either the district court's factfinding or its application of the *Gitter* shared intent standard." Pet. App. 5a.

Petitioner filed a petition for rehearing *en banc*, which was denied. Pet. App. 27a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an ideal opportunity for the Court to resolve a widely acknowledged circuit split

on an important and recurring question of child abduction law. Nine federal courts of appeals and one state court of last resort starkly disagree over the role that parental intent should play in deciding a child's "habitual residence" for the purposes of the Hague Convention. Six courts of appeals – the First, Second, Fourth, Seventh, Ninth, and Eleventh Circuits – have adopted a test which presumes that the parents' last shared intent regarding their child's habitual residence is dispositive. In contrast, the Sixth Circuit and the Nevada Supreme Court have both held that the parents' intent is completely irrelevant in determining the child's habitual residence; instead, those courts consider only the child's objective circumstances and past experiences. Finally, the Third and Eighth Circuits likewise consider the child's factual experiences, but those courts also take parental intent into account as an additional factor.

This conflict is untenable because it leads to inconsistent application of our international treaty obligations – and thus to inconsistent results for similarly situated parents who seek the return of their children – based on geographic happenstance. Moreover, allowing the conflict to persist will provide child abductors with perverse incentives to engage in forum shopping within the United States by removing children to the jurisdictions in which courts are least protective of the rights of the parent who is left behind.

This case presents an appropriate vehicle for the resolution of the conflict, as the issue of habitual residence was litigated below and was the sole basis for the Second Circuit's decision. Certiorari is

further warranted because the Second Circuit's test for determining habitual residence is wrong on the merits, contravening the purpose, text, and history of the Hague Convention.

I. Federal And State Courts Are Irreconcilably Divided Over The Role Of Parental Intent In Determining A Child's "Habitual Residence" Under The Hague Convention.

The division of opinion among federal courts on how to determine a child's habitual residence under the Hague Convention is well recognized by courts in this country and abroad, as well as by commentators and even the Hague Conference on Private International Law.[2] *See, e.g.*, *Vazquez v. Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at *3 (N.D. Tex. Jan. 19, 2011) (describing three-way circuit split "as to what role the intentions of parents should play when determining a child's habitual residence");

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[2] The Hague Conference on Private International Law is an intergovernmental organization made up of seventy-two members, "[t]he purpose of [which] is to work for the progressive unification of the rules of private international law." Statute of the Hague Conference on Private International Law art. 1 (1955). The Conference is responsible for facilitating the drafting, negotiation, and ratification of international conventions addressing issues "such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status." Hague Conference on Private International Law, *Overview*, *available at* http://www.hcch.net/index_en.php?act=text.display&tid=26.

Robert v. Tesson, 507 F.3d 981, 989-90, 998 (6th Cir. 2007) (recognizing circuit split); *Punter v. Secretary of Justice*, [2007] 1 NZLR 40, ¶¶ 98-99 (CA) (N.Z.) (New Zealand Court of Appeals recognizing that the Second Circuit's test "has not been accepted in all circuits of the United States Court of Appeals"); Peter McEleavy, Hague Conference on Private Int'l Law, *Aims & Scope of the Convention: Habitual Residence*, INCADAT, *available at* http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1 (identifying the three different approaches taken in federal courts of appeals); Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases under the Hague Convention*, 77 FORDHAM L. REV. 3325 (2009) (noting "a split among courts on how to properly determine a child's habitual residence").

1. The Second Circuit and five other circuits apply a heavy presumption that a child's habitual residence should be determined by "the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared." *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005); *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir. 2006); *Mozes v. Mozes*, 239 F.3d 1067, 1075 (9th Cir. 2001); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252-53 (11th Cir. 2004) (per curiam).[3]

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[3] Two state intermediate appellate courts have also adopted this test. *See In re S.J.O.B.G.*, 292 S.W.3d 764, 780

This presumption may be overcome only if "the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent." *Gitter*, 396 F.3d at 134. Accordingly, as the Second Circuit has explained, this presumption is difficult to rebut: only in "relatively rare circumstances" will "the child's acclimatization to [a particular] location . . . be so complete that serious harm to the child can be expected to result from compelling his return to the family's intended residence." *Id.*; *see also Mozes*, 239 F.3d at 1079; *Ruiz*, 392 F.3d at 1254.

2. In sharp contrast to the six courts of appeals that have adopted the "shared intent" test, the Sixth Circuit and the Nevada Supreme Court have squarely held that parental intent is irrelevant to a child's habitual residence. Both of these courts instead hold that the determination of a child's habitual residence should be based only on the objective circumstances of the child – such as the child's physical presence in a country, the duration of residency, and evidence of acclimatization.

The Sixth Circuit first articulated this test in *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993). *Friedrich* involved a German father seeking the return of his one-and-a-half-year-old child, whom his wife – a member of the U.S. Army stationed in

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(Tex. App. 2009); *In re Marriage of Forrest & Eaddy*, 51 Cal. Rptr 3d 172, 179-80 (Ct. App. 2006).

Germany – had abducted to the United States. *Id.* at 1398-99. In determining whether the child should be returned to Germany pursuant to the Convention, the Sixth Circuit rejected the mother's argument that the United States was the child's habitual residence simply because she "intended to return to the United States with [the boy] when she was discharged from the military." *Id.* at 1401.

The court acknowledged that the mother "may well have intended for [the child] to move to the United States at some time in the future," but it deemed the mother's intent "*irrelevant* to our inquiry." *Friedrich*, 983 F.2d at 1401 (emphasis added). Instead, it explained, the determination of habitual residence "must focus on the child, not the parents, and examine past experience, not future intentions." *Id.* at 1401. Under this test, the court found the case to be "simple." *Id.* at 1402. The boy had been "born in Germany and [had] resided exclusively in Germany" at the time of removal. *Id.* As a result, Germany was the child's country of habitual residence.

In 2007, the Sixth Circuit reaffirmed that courts should determine a child's habitual residence based "solely on the past experiences of the child, not the intentions of the parents." *Robert*, 507 F.3d at 991 (citing *Friedrich*, 983 F.2d at 1401). The court further explained that a child's habitual residence is the country where, at the time of removal, the child has been "present long enough to allow acclimatization, and where this presence has a degree of settled purpose from the child's perspective . . . ." *Id.* at 993 (quotation marks omitted). In addition to physical presence and length of stay,

factors such as the child's "social engagements," "academic activities," and "meaningful connections with the people and places" in a new country, along with the extent to which a child's "personal belongings" are present in the country, are also relevant in determining the child's degree of acclimatization and settled purpose. *Id.* at 995-97 (quotation marks omitted).

The Nevada Supreme Court has similarly rejected any reliance on parental intent in determining a child's habitual residence. In *Vaile v. Eighth Judicial District Court*, that court held that "courts must look to the past experiences of the parties, and not to the parties' future intentions." 44 P.3d 506, 517 (Nev. 2002) (citing *Friedrich*, 983 F.2d at 1401). Like the Sixth Circuit, the court emphasized that the focus of the inquiry "is on the child, not the parents," and that, as a result, "any subjective intentions that the parents harbor regarding where the child is to live are irrelevant." *Id.*

3. The Third Circuit, like the Sixth Circuit and the Nevada Supreme Court, determines a child's habitual residence by looking to the child's experiences. More specifically, the court deems a country to be the child's habitual residence when it is "the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective." *Karpenko v. Leendertz*, 619 F.3d 259, 263 (3d Cir. 2010).

Unlike the Sixth Circuit, however, the Third Circuit allows courts to give some consideration to parental intent in determining habitual residence. In

Feder v. Evans-Feder, 63 F.3d 217, 222 (3d Cir. 1995), the court acknowledged that the Sixth Circuit had deemed parental intent "irrelevant" to a determination of habitual residence. The Third Circuit nonetheless adopted a test in which the parents' "shared intentions regarding their child's presence" may be taken into account. *Id.* at 224.[4]

The Eighth Circuit similarly looks to the child's objective circumstances to determine his habitual residence while also allowing consideration of parental intent as one factor. In that circuit, the factors "relevant to the determination of habitual residence" include "the settled purpose of the move to the new country from the child's perspective, *parental intent* regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country." *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010) (emphasis added) (quotation marks omitted); *see also Sorenson v. Sorenson*, 559 F.3d 871, 873-74 (8th Cir. 2009);

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[4] In circumstances involving very young children, the Third Circuit has accorded more weight to parental intent, based on its judgment that "[a] very young child . . does not have [the] capability" to acclimatize and "acquire a sense of environmental normalcy." *Whiting v. Krassner*, 391 F.3d 540, 550-51 (3d Cir. 2004) (parental intent important when infant was one year old at time of removal), *see also Delvoye v. Lee*, 329 F 3d 330, 332-34 (3d Cir. 2003) (parental intent important in determining habitual residence of two-month-old baby). In other words, absent any objective indicia of acclimatization, parental intent necessarily figures more prominently in the Third Circuit's analysis.

Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003) (en banc).[5]

4. Petitioner would prevail in the Third, Sixth, and Eighth Circuits, as well as in Nevada. In this case, the Second Circuit relied solely on what it regarded as petitioner and respondent's last shared intent to determine that their children's habitual residence was the United States. Pet. App. 4a-5a. But in the Third, Sixth, and Eighth Circuits and Nevada, a court would instead have begun by considering the children's physical presence in Switzerland, the length of their stay there, and other objective evidence of their acclimatization. *See Robert*, 507 F.3d at 993; *see also Feder*, 63 F.3d at 224.

All of this objective evidence points to Switzerland as the children's habitual residence. Like the child in *Friedrich*, who had lived in Germany for the entirety of his short life, petitioner's son was born in Switzerland and had *never* lived in

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[5] The Tenth Circuit and the New York Appellate Division have followed similar approaches. In *Kanth v. Kanth*, an unpublished opinion, the Tenth Circuit cited the Third Circuit's decision in *Feder* in upholding a district court's determination of habitual residence based on "an analysis of the children's circumstances and the parents' shared intentions." No. 99-4246, 2000 WL 1644099, at *2 (10th Cir. Nov. 2, 2000). And in *People ex rel. Ron v. Levi*, the New York Appellate Division held that habitual residence refers to "a 'degree of settled purpose,' as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there." 719 N.Y.S.2d 365, 367 (N.Y. App. Div. 2001) (citing *Feder*, 63 F.3d at 224)

the United States until respondent abducted him when he was twenty-eight months old.[6] Pet. App. 11a-12a. Similarly, petitioner's daughter had lived in the United States for only eighteen months before moving to Switzerland for more than two years. *Id.* Indeed, both children spent more time in Switzerland than the twenty-two months that the children in *Vaile* spent in Norway – a stay that the Nevada Supreme Court found sufficient to establish habitual residence. *Vaile*, 44 P.3d at 280.

Moreover, the children acclimatized to Switzerland during those two years. The children lived in the same apartment in Zurich for a year and a half prior to their abduction – an apartment that the family furnished with several thousand dollars' worth of furniture and decorations. Pet. App. 36a-38a, 65a-66a. During their time in Switzerland, the children also attended day care, made friends, visited Swiss museums, gardens, and parks, went to community fairs, and participated in a play group. *Id.* 40a-41a, 43a-46a, 54a-55a.

Even to the extent that courts in the Third and Eighth Circuits would also consider the intent of the children's parents, those courts would still conclude that the children's habitual residence was Switzerland. Although the district court found that

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[6] Although petitioner's son did visit the United States briefly during the winter of 2007 and summer of 2008, *see* Pet. App. 11a-12a, in *Friedrich* the Sixth Circuit easily determined that Germany was the child's habitual residence notwithstanding a similar visit by the child to the United States in that case. *See* 983 F.2d at 1399.

petitioner "never intended at any time relevant to this Court's determination to have Switzerland be her children's place of habitual residence," Pet. App. 22a, both the Third and Eighth Circuits have held that one parent's subjective reluctance to move her family to a new location cannot override evidence of actual acclimatization by the children. *See Feder*, 63 F.3d at 224; *Silverman*, 338 F.3d at 899; *see also Barzilay*, 600 F.3d at 918.

5. The courts of appeals are unlikely to resolve this conflict on their own. This question has arisen repeatedly in the circuits over the past eighteen years, but there is no sign of any emerging consensus on the relevance of parental intent. To the contrary, two courts of appeals have expressly recognized the conflicting approaches taken by other circuits but nonetheless rejected those approaches in favor of a different one. *See Mozes*, 239 F.3d at 1076 n.22; *Ruiz*, 392 F.3d at 1253 n.3.[7]

Other circuits have adopted a test to determine habitual residence and then declined to reconsider that approach, even in the face of the conflicting tests in other circuits. For example, since its decision in *Friedrich* nearly twenty years ago, the Sixth Circuit

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[7] Only the Fifth and the D.C. Circuits have yet to weigh in on the issue, though district courts in those circuits have relied freely on the decisions from other circuits. *See, e.g.*, *Clausier v. Mueller*, No. 4:03-CV-1467-A, 2004 WL 906514, at *1 (N.D. Tex. Apr. 27, 2004) (citing *Feder* for test that "[a] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective").

has on three separate occasions reaffirmed its initial view that parental intent plays no role in determining a child's habitual residence. *See Jenkins v. Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009); *Simcox v. Simcox*, 511 F.3d 594, 602 (6th Cir. 2007); *Robert*, 507 F.3d at 991-93, 998 (acknowledging conflicting tests employed in Third and Ninth Circuits and reiterating that "focusing on the child's experience, and not the parents' subjective desires, best serves the Hague Convention's purposes"). Other circuits have similarly adhered to their original approaches.[8]

Finally, the question is so settled in the Second Circuit that decisions there routinely apply the *Gitter* test to determine habitual residence in summary orders, without any substantive discussion or analysis. *See, e.g.*, Pet. App. 1a; *Halaf v. Halaf*, 372 Fed. Appx. 176 (2d Cir. 2010); *Poliero v. Centenaro*, 373 Fed. Appx. 102 (2d Cir. 2010); *Daunis v. Daunis*, 222 Fed. Appx. 32 (2d Cir. 2007).

II. This Case Is An Appropriate Vehicle To Resolve The Question Presented.

Certiorari is also warranted because this case is an appropriate vehicle to resolve the question of

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[8] *See Karpenko v. Leendertz*, 619 F.3d 259, 263 (3d Cir. 2010); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 271-72 (3d Cir. 2007); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 291-92 (3d Cir. 2006); *Whiting v. Krassner*, 391 F.3d 540, 546-47 (3d Cir. 2004); *Delvoye v. Lee*, 329 F.3d 330, 332-33 (3d Cir. 2003); *Barzilay v. Barzilay*, 600 F.3d 912, 917-18 (8th Cir. 2010); *Sorenson v. Sorenson*, 559 F.3d 871, 873 (8th Cir. 2009); *Papakosmas v. Papakosmas*, 483 F.3d 617, 622-23 (9th Cir. 2007); *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004).

which test courts should use to determine a child's habitual residence. That question was raised below, Petr. C.A. Br. 2, and squarely addressed by the district court and the Second Circuit, Pet. App. 2a-5a, 14a-17a. Moreover, the question is outcome determinative in this case: if the courts below had applied the tests espoused by either the Sixth Circuit or the Third and Eighth Circuits, they would have determined that the children's habitual residence was Switzerland. That determination, in turn, would have led the courts to conclude that the Convention's automatic return remedy applied, and that the children should be returned to Switzerland for the Swiss courts to resolve the couple's custody dispute.[9]

III. The Question Presented Is Profoundly Important And Recurs Frequently.

Given the persistent conflict among U.S. courts over how to determine a child's country of habitual

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[9] The remaining elements of petitioner's Hague Convention claim are easily satisfied: there is no real dispute that petitioner had a right of custody when respondent abducted the children to the United States, *see* Petr. Trial Memo. 8-10, *Heydt-Benjamin v Heydt-Benjamin*, No. 10-cv-0881 (S.D.N.Y. 2010), nor can respondent seriously dispute that petitioner was actually exercising that right given her regular contact with the children, Pet. App. 12a. Nor do any exceptions to the return remedy apply. As the district court strongly suggested, *id.* 24a, respondent cannot establish that there was a "grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation," *id.* 13a. In any event, if this Court were to grant certiorari, each of these issues could easily be resolved on remand. *See Abbott*, 130 S. Ct. at 1997 (remanding for consideration of "grave risk" defense).

residence, there are four reasons for this Court to address the question now.

1. The question of how courts should determine habitual residence is critical to the proper resolution of Hague Convention cases. The child's habitual residence is not only the "threshold issue" that a court must decide before considering the merits of any parent's petition brought under the Convention, *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995), but it is also – as the Ninth Circuit acknowledged in *Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001) – "often outcome-determinative" in cases brought under the Convention. If the court concludes that the country from which the child was removed was not his country of habitual residence, the Convention does not apply at all.

Not surprisingly, given its status as the threshold issue in any Convention case, habitual residence is frequently disputed. In just the first three months of this year, for instance, federal district courts decided eight cases involving contested determinations of a child's habitual residence.[10]

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[10] *See Nelson v. Petterle*, No. 2:11-CV-00140, 2011 WL 1048107, at *6 (E.D. Cal. Mar. 18, 2011); *Boehm v. Boehm*, No 8 10-CV-1986-T-27TGW, 2011 WL 863066, at *3 (M.D Fla Mar. 10, 2011); *Roche v. Hartz*, No. 1:10-CV-1819, 2011 WL 841556, at *5-*6 (N D Ohio Mar. 7, 2011); *Barr v. Barr*, No H-11-337, 2011 WL 797664, at *2 (S D. Tex. Feb. 28, 2011); *Johnson v. Johnson*, No 11 Civ. 37(RMB), 2011 WL 569876, at *2-*3 (S D N.Y Feb 10, 2011); *Vazquez v Estrada*, No. 3:10-CV-2519-BF, 2011 WL 196164, at *3 (N D. Tex. Jan 19, 2011); *Seaman v. Peterson*, No. 5 10-CV-462 MTT), 2011 WL 124223, at *9 *10

2. The stakes in Hague Convention proceedings are unquestionably high. As Congress and this Court have recognized, "[a]n abduction can have devastating consequences for a child." *Abbott v. Abbott*, 130 S. Ct. 1983, 1996 (2010). Among other things, it can trigger a "loss of community and stability," as well as "loneliness, anger, and fear of abandonment." *Id.* Indeed, "[s]ome child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse." H.R. REP. NO. 103-390 at 2 (1993). The Hague Convention exists to deter and mitigate these harms.

3. Review is also necessary to ensure a uniform interpretation of the Hague Convention within the United States – a goal that this Court implicitly recognized as important in deciding to grant certiorari in last Term's Hague Convention case, *Abbott v. Abbott*, 130 S. Ct. at 1989. Without this Court's intervention, the test used in the United States to determine "habitual residence" for purposes of the Convention will hinge solely on geographic happenstance. This is because ICARA authorizes a parent to file a petition for the return of her child only in the jurisdiction where the child is currently located. 42 U.S.C. § 11603(b). Thus, for example, if respondent had abducted the children to New Jersey instead of New York, courts there would have determined that their habitual residence was Switzerland simply because the Third Circuit –

(M.D. Ga. Jan. 14, 2011); *McKie v. Jude*, No. 10-103-DLB, 2011 WL 53058, at *7-*15 (E.D. Ky Jan. 7, 2011)

unlike the Second – does not treat parental intent as presumptively dispositive of a child's habitual residence. This is precisely the result Congress sought to avoid when it implemented the Convention through ICARA. *See* H.R. REP. NO. 100-525, at 17-18 (1988) (Executive Communication submitted by the U.S. Department of State to the House of Representatives on Mar. 6, 1987) ("It is hoped that enactment of the bill will ensure greater uniformity in the Convention's implementation and interpretation in the United States.").

Worse still, such inconsistencies actually encourage forum shopping within the United States. Without a uniform test, a parent who lives abroad with his children but who seeks to obtain a more favorable custody determination through abduction can accomplish that goal by taking his children to whichever U.S. jurisdiction happens to have the most favorable test to determine habitual residence (even if he has no prior connection to that jurisdiction or does not intend to remain there), thereby ensuring that the left-behind parent will not be able to avail herself of the Convention at all.

4. Disagreement among the circuits has the further deleterious effect of discouraging the "uniform international interpretation of the Convention" that Congress specifically envisioned. 42 U.S.C. § 11601. By granting review and clarifying the test that applies in the United States, the Court can contribute to greater uniformity among member states and provide guidance to other nations where the law remains unsettled. Indeed, foreign courts have already looked to the United States on this very question. *See, e.g.*, *L.K. v. Director-General*, (2009)

237 CLR 582, ¶ 28 (Austl.); *Punter v. Secretary of Justice*, [2007] 1 NZLR 40, ¶¶ 98-99 (CA) (N.Z.).

IV. The Second Circuit's "Shared Intent" Test Flouts The Purpose, Text, History, And International Interpretations Of The Hague Convention.

By creating the presumption that custody disputes will be resolved in whichever country the parents last shared an intention to reside – rather than in the country in which the child was actually physically present and settled – the Second Circuit's habitual residence test contravenes the purpose, text, and history of the Hague Convention. The Second Circuit's interpretation is also at odds with that of numerous sister signatories.

1. As this Court explained in *Abbott*, the Hague Convention is "based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence." 130 S. Ct. 1983, 1995 (2010). By keeping the child in his country of habitual residence while custody proceedings are ongoing, the Convention seeks to prevent the loss of a child's "community and stability." *Id.* at 1996.

The Second Circuit's "shared intent" test, however, often leads to the loss of a child's "community and stability." In the Second Circuit's view, the child's habitual residence is the country in which his parents last shared an intent to reside, even when that country is a place where the child has never lived – as is true of petitioner's son here – and is not the place to which the child has become acclimatized. This test allows the child to be

uprooted from his day-to-day surroundings and transplanted to a new environment for the duration of his parents' custody dispute, so long as – at some point in time – the parents harbored a mutual intent that he should reside elsewhere.

The Second Circuit's test for determining habitual residence also undermines the Convention because it lacks the predictability necessary to deter parents from abducting their children. Deciding a child's habitual residence under the "shared intent" test will often hinge on complex and unpredictable credibility determinations involving extensive testimony regarding past thoughts and conversations. Additionally, such credibility determinations will be especially difficult in light of the context in which international child abductions commonly occur, in which the relationship between the two parents has become so poisonous that one parent is willing to take the child to another country to gain the upper hand in a custody dispute. Not only do the parents almost always disagree as to the child's habitual residence – as both the Second and Ninth Circuits have acknowledged, *see Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001) – but they often disavow prior expressions of intent and accuse one another of fabricating and misconstruing testimony.

A test that relies on objective, child-centered factors, by contrast, provides considerably clearer ex ante guidance and deterrence than one that relies primarily on parental intent. Objective factors relating to the child's experience – such as a child's physical presence and the amount of time spent in a

country, and whether the child was enrolled in school and participated in social activities – can be easily demonstrated through credible evidence.

2. Three words in the text of the relevant Hague Convention articles – "child," "habitually," and "resident," arts. 3-4, 12 – confirm that a child should be returned to the country where the child has grown settled and acclimatized over time, rather than to some country in which the parents may wish to live in the future.

To begin with, the Second Circuit's test cannot be squared with the Convention's choice of the word "resident." Although that word most naturally refers to past and current physical presence, the Second Circuit's approach ignores a child's actual physical presence by focusing instead on the subjective future intentions of the child's parents. In this case, the Second Circuit found the children to be habitually "resident" in the United States even though neither child had been physically present in the United States for more than two years apart from a vacation there during parts of July and August 2008. Pet. App. 11a-12a. Indeed, with the exception of two trips to the United States, the couple's son had spent his *entire life* outside the United States. *Id.*

The Second Circuit's test also cannot be reconciled with the Convention's use of the word "habitually" to modify "resident." The word "habitually" signifies that, whatever else may be true of a child's residence, at the very least it must be the child's ordinary or customary place of living. *See, e.g.*, *Cameron v. Cameron*, [1995] 1996 S.C. 17 (Sess.) (Scot.) (habitual residence is "the same for all practical purposes" as "ordinary residence")

(quotation marks omitted). Yet the Second Circuit's test presumes a child's "habitual" residence to be the country where her parents hoped to live in the future, rather than the country in which the child has been living as an ordinary matter. In this case, for instance, it is difficult to imagine – and neither the district court nor the Second Circuit explained – how the children could have possibly been more "habitually" resident in the United States than in Switzerland at the time of removal.

Finally, as even the Second Circuit has acknowledged, *see Gitter*, 396 F.3d at 132, the Convention makes clear that the relevant inquiry is the child's habitual residence, and not that of her parents. *See* Hague Convention art. 3 (referring to "the State in which the *child* was habitually resident") (emphasis added). The Second Circuit's approach ignores this language by focusing on parental intent instead of the child's own circumstances.

3. The history of the Hague Convention further reinforces that the Second Circuit's shared intent test is incorrect.

a. First, the Hague Conference consciously decided to attach the availability of the return remedy to the child's removal from his "habitual residence" rather than the child's "domicile." The determination of an individual's domicile normally requires an inquiry into intent. *See, e.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (domicile requires "a certain state of mind concerning one's intent to remain there"); *see also* CODE CIVIL [C. CIV.] art. 103 (Fr.) (domicile requires "intention to fix one's main establishment");

SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 23 (Switz.) (domicile is the place where a person "resides with the intention of settling there"). Moreover, determinations regarding a *child*'s domicile hinge on the intentions of the child's parents. *See Mississippi Band of Choctaw Indians*, 490 U.S. at 48 (a child's domicile will sometimes be "a place where the child has never been" because it is determined by parental intent).

It was for this exact reason that the Hague Conference declined to use the term "domicile" in its various conventions, opting instead for the term "habitual residence." *See* P. Bellet & B. Goldman, *Explanatory Report on the 1970 Hague Divorce Convention* ("Bellet Report"), *in* ACTES ET DOCUMENTS DE LA ONZIÈME SESSION, TOME II, at 10-11 (1968) (Convention deliberately used habitual residence in lieu of domicile); Pérez-Vera Report at 445 (habitual residence regarded as different from domicile); Michel Verwilghen, *Explanatory Report on the 1973 Hague Maintenance Conventions*, *in* ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION, TOME IV, at 441 (1972) (habitual residence is a concept "distinct, in particular, from domicile"). The explanatory report on the 1970 Hague Divorce Convention, for example, specifically cites the intent element of domicile as a reason for rejecting that term in favor of the term "habitual residence." *See* Bellet Report at 11; *see also* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT OF THE SECOND SPECIAL COMMISSION MEETING, Pt. Three, Response to Question 5 (1993).

b. Second, although none of the various Hague Conventions that use the phrase "habitual residence" have specifically defined the term,[11] the explanatory reports that accompany these conventions indicate that a child's "habitual residence" should be determined by reference to the child's objective experiences and not to parental intent. As the Pérez-Vera Report explains, the Convention's object is to prevent situations in which "the child is taken out of the family and social environment in which its life has developed" – a definition that leaves no room for habitual residence determinations that look presumptively to parental intent divorced from objective factors involving a child's experience. Pérez-Vera Report at 428; *see also* W. de Steiger, *Explanatory Report on the 1961 Hague Protection of Minors Convention*, *in* ACTES ET DOCUMENTS DE LA NEUVIÈME SESSION, TOME IV, at 14 (1960) (describing habitual residence as "the effective center of the child's life" (Eng. trans.)). The Pérez-Vera Report's further declaration that "children must no longer be regarded as parents' property, but must be recognised as individuals with their own rights and needs," only reinforces the point. Pérez-Vera Report at 431 (quotation marks omitted).

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[11] *See, e.g.*, Paul Lagarde, *Explanatory Report on the 1996 Hague Child Protection Convention*, *in* PROCEEDINGS OF THE EIGHTEENTH SESSION, TOME II, at 553 (1996) ("A positive definition [of habitual residence] had been proposed . . . but it went against the Conference's tradition and received no support").

The 2006 Special Commission Report on the Child Abduction Convention confirms that an objective, child-centered approach to habitual residence is the correct one. That report recognized the use of conflicting tests to determine habitual residence, and it described a "wide consensus" that courts should adopt a uniform approach based on factual considerations such as "the child's schooling, the time spent in one place, the settling of the family in a certain place, and the integration of the child." HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT ON THE FIFTH MEETING OF THE SPECIAL COMMISSION 44-45 (2006). In short, the history of the Hague Convention confirms what the Convention's purpose and text already make clear: the Second Circuit's test is inconsistent with the Convention's intent that a child's habitual residence will be the country to which she has grown accustomed over time.

4. In construing the terms of a treaty, "the opinions of our sister signatories [are] entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quotation marks omitted). Although the other signatory states have yet to reach consensus on a single test to be used in determining a child's habitual residence, several foreign courts have recently rejected the Second Circuit's view that a child's habitual residence should be presumptively based on parental intent. In a 2009 decision, for instance, the European Court of Justice made clear that parental intent is just one factor to be considered in determining habitual residence. Case C-523/07,

2009 E.C.R. I-02805 ¶¶ 38-40.[12] The ECJ explained that courts should also focus on the child's objective experiences, as reflected by his "physical presence" in a particular country, the "duration" and "regularity" of his residence there, his "attendance at school," and his "social relationships." *Id.* ¶¶ 38-39.[13]

Other countries' courts have similarly rejected the view that parental intent is presumptively dispositive of a child's habitual residence. The Australian High Court, for instance, has stated that parental intent is "not to be given controlling weight" in determining a child's habitual residence, *L.K. v. Director-General*, (2009) 237 CLR 582, ¶ 28 (Austl.),

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[12] The ECJ issued its decision with respect to the test for determining a child's habitual residence under an EU Regulation, Council Regulation 2201/2003, arts 11, 60, 2003 O.J. (L 338) (EC), which incorporates the terms of the Hague Convention.

[13] Because the European Union has incorporated the Hague Convention into the body of EU law through Regulation 2201, arts. 11, 60, 2003 O.J. (L 338) (EC), the ECJ's construction of the habitual residence test is binding on all twenty-seven EU member states except Denmark, *id.* (31), all of which are, in turn, signatories to the Hague Convention. *See id.* art. 72 ("This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community."); Court of Justice of the European Union, *Jurisdiction*, *available at http://curia.europa.eu/jcms/jcms/Jo2_7024/* ("[A] Court of Justice [reply to a reference for a preliminary ruling] is not merely an opinion, but takes the form of a judgment or reasoned order. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised.")

and New Zealand appellate courts have noted that parental intent, "albeit important, is only one factor to be taken into account," *S.K. v. K.P.* [2005] 3 NZLR 590, ¶75 (CA) (N.Z.); *see also Punter v. Secretary of Justice*, [2007] 1 NZLR 40, ¶ 106 (CA) (N.Z.). And the Hague Conference has identified additional countries whose courts apply a "child-centred, factual approach" in determining a child's habitual residence. *See* Peter McEleavy, Hague Conference on Private Int'l Law, *Aims & Scope of the Convention: Habitual Residence*, INCADAT, *available at* http://www.incadat.com/index.cfm?act=analysis.show&sl=3&lng=1 (citing cases from Germany, Switzerland, and Quebec, Canada). This Court should not permit this country's law to diverge from such international decisions, particularly in the absence of this Court's consideration of the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 22, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Ava HEYDT-BENJAMIN, Petitioner-Appellant,

v.

Thomas HEYDT-BENJAMIN, Respondent-Appellee.

No. 10-1780-cv. Dec. 28, 2010.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on April 5, 2010 is AFFIRMED.

Petitioner Ava Heydt-Benjamin appeals from the district court's denial of her petition pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted at* 51 Fed. Reg. 10,494 (Mar. 26, 1986) (the "Hague Convention"), and the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-10, for return of her two children to Switzerland after their removal to the United States by their father and petitioner's husband, respondent Thomas Heydt-Benjamin. Petitioner also appeals from the district court's dismissal of her motion to vacate an interim custody order entered by the Supreme Court of the State of New York for Putnam County. The parents and both children, now

ages 3 and 4, are United States citizens. Petitioner argues that the district court erred in finding that the children's "habitual residence" for purposes of the Hague Convention was the United States rather than Switzerland. *See Gitter v. Gitter*, 396 F.3d 124, 130-31 (2d Cir. 2005).[1] "In cases arising under the Convention, a district court's factual determinations are reviewed for clear error. However, the district court's application of the Convention to the facts it has found, like the interpretation of the Convention, is subject to *de novo* review." *Id.* at 129 (citation, brackets, emphasis, and internal quotation marks omitted). We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

A child's "habitual residence" under the Hague Convention is "a legal precept that we review de novo." *Id.* at 133 n.8 (citing *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001)). We have held that "courts should begin an analysis of a child's habitual residence by considering the relevant intentions," specifically "the intent of the person or persons entitled to fix the place of the child's residence, which is likely to be the parents in most cases." *Id.* at 132 (internal quotation marks and citation omitted). The last shared intention

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[1] To prevail on a claim under the Hague Convention, a petitioner must show by a preponderance of the evidence that (1) the child was habitually resident in one State and has been removed to or retained in a different State, (2) the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence, and (3) the petitioner was exercising those rights at the time of the removal or retention. *Gitter v. Gitter*, 396 F.3d at 130-31 (citing 42 U.S.C. § 11603(e)(1)(A), Hague Convention art. 3).

of the parents regarding the child's residence "is a question of fact in which the findings of the district court are entitled to deference, and we consequently review those findings for clear error." *Id.* at 133. Where the parents have come to dispute the child's habitual residence, the district court must "determine the intentions of the parents as of the last time that their intentions were shared." *Id.* In general, a court "will presume that a child's habitual residence is consistent with the intentions of those entitled to fix the child's residence at the time those intentions were mutually shared." *Id.* That presumption may, however, be rebutted where, "notwithstanding the intent of those entitled to fix the child's habitual residence, the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted." *Id.* This may be so when "the child's acclimatization to the location abroad [is] so complete that serious harm to the child can be expected to result from compelling his return to the family's intended residence." *Id.* at 134.

Petitioner asserts that, beginning in July 2009, she and her husband reached an agreement under which they lived separately in Zurich, Switzerland, with joint custody of the children, and without any plan for a different residence in the future. She argues that these circumstances demonstrate the parents' shared intention to abandon their former residence in the United States and to fix the habitual residence of the children in Switzerland. This was the state of affairs when respondent removed the children to the United States without petitioner's knowledge on January 25, 2010. In the alternative, petitioner argues, without citation to controlling authority, that "the inquiry into

shared intent" should not "acquire[ ] a primacy over a regard for the totality of the circumstances." Appellant's Br. at 42. Among other allegedly relevant circumstances, she asserts that respondent fled Switzerland in January 2010 in an effort to avoid a custody action filed by petitioner in the Swiss courts on January 14, 2010, and contends that "[t]his is exactly the improper forum shopping [that the] Hague Convention seeks to prevent." *Id.* at 54. The district court recognized that respondent's actions were "motivated by forum shopping." Tr. at 21, *Heydt-Benjamin v. Heydt-Benjamin*, No. 10 CV 881 (S.D.N.Y. Mar. 15, 2010).

Whatever respondent's motive in removing the children from Switzerland, the district court was bound to apply the terms of the Hague Convention as incorporated through the International Child Abduction Remedies Act and interpreted by United States courts. The legal standard governing the habitual residence issue is the "shared intent" test laid down in *Gitter v. Gitter*, 396 F.3d 124. The district court, based in part upon credibility determinations, found "without any difficulty at all . . . that the petitioner never intended at any time relevant to this Court's determination to have Switzerland be her children's place of habitual residence," Tr. at 18, *Heydt-Benjamin v. Heydt-Benjamin*, No. 10 CV 881 (S.D.N.Y. Mar. 15, 2010), and that "at the time the couple left for Switzerland, they had a shared intention to raise their children in the United States and make the United States the children's habitual residence, and . . . they each continued to adhere to that intention," *id.* at 20. Based on these findings of fact, the district court concluded that the children's habitual residence was the United States. We identify

no error in either the district court's factfinding or its application of the *Gitter* "shared intent" standard.

Petitioner has not argued on appeal, and the record does not in any way suggest, that these very young children had an opportunity to become acclimatized to life in Switzerland to such an extent that serious harm could be expected to result from allowing their return to the United States. *See Gitter v. Gitter,* 396 F.3d at 133-34. Under these circumstances, we find no clear error in the district court's factual determinations and no error in its conclusion that the children's habitual residence for purposes of the Hague Convention was the United States. We therefore conclude that petitioner failed to meet her burden under the Hague Convention, that the petition was correctly denied, and that petitioner's motion to vacate the state court interim custody order was correctly dismissed as moot.

We have considered petitioner's other arguments on appeal and conclude that they are without merit. Accordingly, we AFFIRM the judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Ava Heydt-Benjamin,

Petitioner,

v.

Thomas Heydt-Benjamin,

Respondent.

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10 Civ. 881 (JSR)

FINAL JUDGMENT

JED S. RAKOFF, U.S.D.J.

The Court's edits on its ruling from the bench having been delivered to the court reporter (with copies to counsel to follow), the Court hereby enters final judgment, denying petitioner's petition for return of children and dismissing as moot petitioner's motion to vacate the interim custody order entered by the Supreme Court of the State of New York, Putnam County.

The Clerk of the Court is directed to close all open entries on the docket of this case.

SO ORDERED.

Dated: New York, NY
April 2, 2010

/S/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENCH DECISION

Ava Heydt-Benjamin,

Petitioner,

v.

Thomas Heydt-Benjamin,

Respondent.

10 Civ. 881 (JSR)

New York, N.Y.
March 15, 2010
2:00 p.m.

Before:

HON. JED. S. RAKOFF,
District Judge

APPEARANCES

NEIL SALTZMAN
Attorney for Petitioner

SHERESKY ARONSON MAYEFSKY & SLOAN LLP
Attorneys for Respondent

BY: ALLAN MAYEFSKY

[2]

(Case Called)

THE COURT: Please, be seated.

This is the case of Ava Heydt-Benjamin versus Thomas Heydt-Benjamin.

MR. SALTZMAN: Neil Saltzman, for petitioner. Good afternoon, your Honor.

MR. MAYEFSKY: Allan Mayefsky, for the respondent, along with Heidi Harris.

THE COURT: Good afternoon.

The Court will note the presence of both the petitioner and respondent, as well as various other people in the courtroom.

I am going to render my decision orally but with the proviso that after the court reporter sends me the transcript I reserve the right to make edits. No substantive edits will be made. These will be just grammatical and stylistic edits so that my mother the English teacher doesn't disapprove from the grave.

Also, I will not enter the final judgment, though it will not change, until I've made those edits; then I'll send the edits to counsel and enter the final judgment at that time. Usually that whole process takes about a week.

I also wanted to take this occasion to once again express my appreciation to counsel for both sides. As may perhaps have been evident, I hold counsel on a fairly tight [3] leash in my court, but I do so because of my deep-seated belief in the adversary system and in the integrity of the legal profession. One of you, and your client, will be unhappy at the end. One will be

happy. But both lawyers really should be pleased with the highly professional work that they did and both clients should recognize that, whoever is victorious and whoever is not victorious, your lawyers on both sides were excellent and very zealous in their representation of you.

The last thing I wanted to say by way of preliminaries is that my findings of fact will turn in important ways on credibility determinations. And though in the end I did not find either the petitioner or the respondent totally credible, I don't want to be misunderstood. I thought they were both fine human beings. It's a great shame that they've had to undergo this vicissitude in their lives because it seems clear to me that basically these are very decent people who have had their differences; but that doesn't excuse my obligation to make hardnosed judgments about whether one is being totally accurate in one's testimony or not.

So against all that background let me say that this action arises from a petitioner [sic] brought under the Hague Convention which is implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. Section 11601 et seq.

[4] The petitioner, Ava Heydt-Benjamin, is a citizen of the United States who currently resides in Switzerland. Her husband, respondent Thomas Heydt-Benjamin, is also a citizen of the United States and presently resides in New York with their two children, I.H.-B. and L.H.-B.,* respectively, four and

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* This petition replaces all uses of the children's names with initials.

two years old. And the children are both U.S. citizens as well.

Thomas brought the children to the United States from Switzerland in late January of this year. In her petition, Ava seeks the return of the children to Switzerland, alleging that Switzerland is their habitual residence from which they were wrongfully removed by respondent. On February 3rd, 2010 pursuant to the Hague Convention, petitioner filed an application for the return of the children with the United States Department of State, and the next day she filed a Hague Convention petitioner [sic] with this Court, along with an order to show cause.

On February 11th the Court held an initial conference on the order to show cause with both counsel and scheduled the evidentiary hearing that has just concluded. At that conference respondent turned over to the Court the passports for himself and his children. The evidentiary hearing commenced on March 8, 2010 and concluded several days later.

In addition, the Court received various written submissions, including some that the Court received just in the [5] last few days, for which I thank counsel.

I should also mention that there are some related proceedings ongoing. There's a custody action initiated by petitioner that is pending in Switzerland. There is a divorce action that respondent commenced in August of 2009 here in Putnam County, New York. In that connection I should also mention that on January 28, 2010, respondent filed an ex parte emergency order seeking temporary custody of the children, which the New York court granted on February 1st and thereafter extended until at least

April 5th. One of the issues before this Court is whether to vacate that interim custody order and find that the Putnam County custody proceedings have been in violation of the Hague Convention, and I will rule on that matter at the end of this series of rulings.

Let me also review the basic chronology.

Petitioner was born in Connecticut. Respondent was born in Pennsylvania. They met in 1999, I believe, in Florida. They were married on June 22, 2003, in New York. Initially, they lived in various locations in New York and Connecticut. In the summer of 2004 they moved to Massachusetts because respondent was about to begin a Masters and PhD program at the University of Massachusetts in Amherst. The parties spent the next three years in Massachusetts and had their first child. I.H.-B. was born in Massachusetts on December 30, 2005.

In the summer of 2007 the family moved to Zurich, [6] Switzerland where Thomas had obtained an internship with IBM that was initially intended to last three months. While in Zurich, Thomas applied to and was accepted into a doctoral program at the Swiss Federal Institute of Technology (sometimes called "ETH") in Zurich. This was under a program sponsored by IBM, and his studies were to begin in 2008 and expected to last three years. The parties' second child, L.H-B., was born in Zurich on September 29, 2007.

The family returned to New York in November and December of 2007, during which they stayed with respondent's parents in Manhattan and in Putnam Valley, and then in January 2008 the family returned to Zurich. In addition, to pursuing his studies at ETH,

respondent continued working for IBM under a series of temporary employment contracts. The family visited respondent's parents in New York briefly during this period for parts of July and August 2008.

In February 2009 petitioner flew to the United States, partly to pursue artistic endeavors, partly because of personal relationships and problems. She spent part of the time in Texas where she lived with a gentleman with whom she had a romantic attachment. In August 2009, as mentioned, respondent commenced a divorce action in the New York courts. However, during the same summer the parties also discussed at least partial reconciliation.

In September 2009 petitioner returned to Zurich. She [7] did not cohabit with respondent but requested access to the children. She came back to the United States in October/November to house sit in California, during which time she was served with the divorce papers. She then returned to Switzerland in early December. During this period petitioner had several visits with the children including some overnight stays, the last of which was just very shortly before respondent left with the children for New York. Without informing petitioner respondent flew to New York with the children on or about January 26, 2010, and since then he has lived with them and his own parents in their Putnam Valley and Manhattan homes while petitioner has resided in what had been the marital apartment in Zurich.

By way of legal standards, let me first note that both the United States and Switzerland are signatories to the Hague Convention, which was adopted in part "to protect children internationally from the harmful effects of their wrongful removal or

retention and to establish procedures to ensure their prompt return to the state of their habitual residence." That's a quote from the preamble to the Hague Convention, 10/25/80.

To invoke the protections of the Hague Convention a petitioner must prove certain elements:

First, that a child under age 16 whose return is sought is habitually a resident in a signatory country and has [8] been removed to another country.

Second, that the removal was wrongful, that is in breach of the petitioner's custody rights under the law of the state of habitual residence.

Third, that the petitioner was exercising custody over the child at the time of the removal.

These elements are all elements as to which the petitioner bears the burden of proof by a preponderance of the evidence. *See* 42 U.S.C. Section 11603 and *see also* the Second Circuit case of *Gitter v. Gitter*, 396 F.3d 124; a Second Circuit decision from 2005, at pages 130 and 131.

If petitioner succeeds in making these showings the respondent can nonetheless prevail if the respondent establishes one or more affirmative defenses. Here, the only affirmative defense that respondent has raised is the claim that there is a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation. This defense, which is provided by Article 13(b) of the Hague Convention, must be proven, not by a preponderance of the evidence, but by clear and convincing evidence, in order to prevail. *See* 42 U.S.C. Section 11603 (e) (2) (A).

In the end I think the most significant dispute between the parties from the standpoint of the elements I've just described is over the first element, namely, the issue of [9] whether the children were habitually resident in Switzerland, which is a proposition that the petitioner must prove in order to prevail. The term "habitual resident" is not defined in the Hague Convention itself but it has been subject of considerable case law. The leading case in the Second Circuit is *Gitter v. Gitter*, which I mentioned earlier, and it states with respect to habitual residence as follows:

"First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally, the shared intent of the parent should control the habitual residence of the child.

"Second, the Court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent."

And that's from *Gitter v. Gitter* at page 134.

In setting this standard, the Second Circuit noted the importance of ascertaining the last shared intent of the parents in determining a child's habitual residence, because even though the Hague Convention is ultimately concerned with the habitual residence of the child, children do not usually [10] make

independent choices in that regard and that certainly is true where the children are as young as the children are in this case. Then, as was stated in *Gitter*, "It is more useful to focus on the intent of the child's parents or others who may fix the child's residence." That's from *Gitter* at page 132.

I also found helpful the Ninth Circuit case of *Mozes v. Mozes*, 239 F.3d 1067, Ninth Circuit 2001, a decision cited with approval by the Second Circuit in *Gitter*. *Mozes* involved situations that were somewhat closer to the situation here than *Gitter* itself. *Mozes* says, for example, the following:

"The first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind. Otherwise, one is not habitually residing; one is away for a temporary absence of long or short duration. Of course one need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad originally intended to be temporary. Nor need the intention be expressly declared if it is manifest from one's actions; indeed, one's actions may belie any declaration that no abandonment was intended. If you have lived continuously in the same place for several years on end, for example, we would be hard pressed to conclude that you had not abandoned any prior habitual residence. On the other hand one may effectively abandon a prior habitual residence without intent to occupy the next one for more than a limited period." That's [11] from *Mozes* at 1075.

Mozes also went on to consider the question of whose intention matters when the parents no longer agree on the child's habitual residence. In such cases "the representations of the parties cannot be accepted

at face value and courts must determine from all available evidence whether the parent petitioning for the return of a child has already agreed to the child's taking up habitual residence where it is." That's from page 1076.

And later on in *Mozes*: "On one side are cases where the Court finds that the family as a unit has manifested a settled purpose to change habitual residence, despite the fact that one parent may have had qualms about the move. Most commonly this occurs when both parents and the child translocate together under circumstances suggesting that they intend to make their home in the new country. When courts find that a family has jointly taken all steps associated with abandoning habitual residence in one country to take it up in another, they are generally unwilling to let one parent's alleged reservations about the move stand in the way of finding a shared and settled purpose.

"On the other side are cases where the child's initial translocation from an established habitual residence was clearly intended to be of a specific delimited period. In these cases, courts have generally refused to find the changed [12] intentions of one parent led to an alteration in the child's habitual residence.

"In between are cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. Sometimes the circumstances surrounding the child's stay are such that, despite the lack of perfect consensus, the court finds the parents to have shared a settled mutual intent that the stay last indefinitely. When this is the case, we can reasonably infer a mutual abandonment

of the child's prior habitual residence. Other times, however, circumstances are such that, even though the exact length of the stay was left open to negotiation, the court is able to find no settled mutual intent from which abandonment can be inferred."

That's a lengthy quote, from pages 1076-77, but I think it fairly sets forth some of the considerations that this Court needs to look at and address in making the determination as to the children's habitual residence.

Finally, before reaching my conclusions, I want to note that the merits of the underlying custody dispute are completely irrelevant to anything this Court needs to determine and play no role in any of the Court's determinations. Custody is an issue that will be determined by the appropriate court in Switzerland or New York, but not by this Court. This Court is concerned solely with whether or not the requirements of the [13] Hague Convention have been met or not.

Now, I mentioned earlier, and I need now to mention again in connection with the conclusions that I am about to render, that this was a case in which credibility determinations played a substantial role. It was not the only factor by any means that the Court took account of, but the Court had to carefully scrutinize what the parties testified to from the stand. And I found this to be not wholly without difficulty because – as one would expect in a case in which emotions play so big a role and in which the intimate relationships between a man and a woman and their children are at the heart of the dispute – it is difficult for even the most honest witness not to be blinded by his or her emotions and to color his or her testimony accordingly.

As I mentioned, I think the petitioner and respondent here are basically quite fine people. I have, in an ultimate sense, a high regard for them both, but I found that each of them to a greater or lesser extent colored their testimony to accord with their highly emotional desire to keep custody of their children, and this influenced their testimony to the degree that I was not able to credit the entire testimony of either of them, though I did credit parts of it. As I go through these conclusions, I will not dwell on which parts of the testimony I found credible and which parts I found non-credible, but credibility is a factor that played an [14] important part in the Court's determination.

There are certain ironies in the testimonies of both petitioner and respondent. Petitioner, in the Court's view, has no deep desire, whatsoever, to remain isolated in Switzerland, with or without her children. She went there reluctantly, against her wishes, but for what she believed was only a three month sojourn that would be of service to her husband's career. She remained there even more reluctantly, and, of course, did not remain there throughout the entire period. There is therefore an irony, that would be humorous were the stakes not so serious, in her now taking the position that Switzerland is her children's habitual residence as well as her own.

On the other side there is, perhaps, not equal irony but a certain irony in the degree to which the respondent now emphasizes that his sojourn in Switzerland was a mere blip in his otherwise settled intent to raise the children in the United States. This was not his total attitude, the Court finds, when he readily accepted the shift from the three months

sojourn to a three year stay, with the possibility of still further time in Switzerland thereafter. So his overstated protestations that his heart was always in the United States as to the habitual residence of his children, one of whom was born and raised entirely in Switzerland, is not without its own ironic aspects.

[15] Nevertheless, the Court finds that petitioner has not carried her burden of establishing by a preponderance of the evidence that Switzerland was and is the children's habitual residence, for the following reasons:

To begin with, it is clear that when the parties initially traveled to Zurich in the summer of 2007, they intended to stay there for no longer than the three month term of the respondent's internship. That was the last point in time when the parents mutually formed a shared intent that was clearly expressed. I'll develop that further in a minute but it is clear that at that point in time the parents shared the intent that the children be raised in the United States and regarded the move to Switzerland as a mere short interim move not much different from summer vacations or summer studies abroad or other brief sojourns of that sort.

After the change to a three-year stay, the matter became murkier, but the Court concludes that there was never an abandonment of that last shared intent.

Petitioner, of course, notes that the decision to stay for three years was in some sense a mutual decision. There's also evidence that if the respondent thereafter were unable to obtain employment in the United States, he would at least have considered continuing to stay abroad. He also had his employment contract

with IBM, which he renewed in 2009 for another year. Furthermore, the parties had signed a lease and [16] occupied and furnished an apartment and had enrolled the children in a day care center.

But against this are facts that the Court finds show that the shared intent remained to return to the United States.

All members of the family were American citizens, respondent, petitioner and the children. They were staying in Switzerland on a so-called Ausweis-B permit, which was in effect a work-study permit. The petitioner lived a somewhat isolated life in Switzerland and had limited language knowledge of German. The furniture from their Massachusetts apartment remained in storage in the United States. Moreover, quite important in the Court's view is the fact that during the relevant period both petitioner and respondent repeatedly relied on respondent's parents situated in New York to assume what at times was primary responsibility for the children.

This included two long visits in New York and what the Court finds was the unequivocal expectation by petitioner during her lengthy sojourn in the United States in 2009 that her mother-in-law would care for the children full-time in New York while the petitioner pursued her various projects in various parts of the United States.

Now, as it happened, when the petitioner traveled to the United States for seven months in 2009 though she initially intended to bring her children with her, she ultimately came without her children, who remained in Switzerland. There is an [17] element of the relationship between the parties here that is a

little reminiscent of the famous Ibsen play, *The Doll's House*.

Respondent was a somewhat controlling male figure, to whom the petitioner subjugated much of her autonomy, and then finally separated and tried to find her own way, even though that entailed here, as it did in Ibsen's famous play, leaving the children for a time. But to me the importance of that seven-month separation was what it shows about where the petitioner saw her future and saw her children's future, because I do not believe she had any intent to, in any long term sense, abandon her children; but rather, she saw not only her future but also theirs as well as being in the United States. I think that comes through loud and clear from the evidence.

I might add that during the period immediately before this trip, petitioner discussed with respondent her loneliness in Switzerland and the isolation she was feeling, and I find no credible suggestion that the respondent at any point said to her in effect, "Well, too bad; we're going to remain here in Switzerland, this is where our future lies." On the contrary, I think the message conveyed in effect was, "Don't worry; we're corning back to the United States eventually. I've got career plans and other plans that have to be satisfied by obtaining this PhD but then we're coming back." Not that those were his exact words, but I find that was the substance of the message [18] conveyed.

Toward the end of her return to the U.S., in the summer of 2009, petitioner attempted a reconciliation, but it did not result in any meeting of the minds, even as to the issues with which this court is concerned. Respondent, who, one could well understand, felt deeply wounded by his wife's leaving him for another

man, had already sued for divorce and did not allow petitioner to resume living with the children and him. His reactions were in some sense indicative of how these two fine people are of very different temperaments. The petitioner is someone who is very much ruled by her emotions. The respondent is less so that way, and his response was in effect to set a series of conditions for reconciliation that it was unlikely petitioner would accept in her heart. But, again, my focus is solely on the question of what any of this showed about the issue of habitual residence. And the respondent to a large extent placed severe barriers in the petitioner's ability to be with her children even after she returned to Switzerland, certainly, not indicative of a shared intent of any kind, let alone a shared intent as to where the children would permanently reside.

The Court therefore without any difficulty at all finds that the petitioner never intended at any time relevant to this Court's determination to have Switzerland be her children's place of habitual residence. The focus then shifts [19] to the respondent's intentions.

In one of her recorded exchanges with Ben Rosengart, petitioner mentions that whereas she seeks "fulfillment of purpose whether within or without the confines of the family," respondent is someone for whom "responsibility to family trumps personal freedom." *See* Respondent's Exhibit B. I think there is substantial truth to that assessment, but I also conclude that for respondent, responsibility to family included responsibility to return with his children to the United States.

To be sure, he also had a strong interest in furthering his career, but there is nothing that suggests to this Court that he saw Switzerland as being the place where that career would habitually reside, so to speak. He saw Switzerland as the place where he would get his PhD and have a helpful interaction with IBM, but his desire – and here I do credit his testimony in this regard – was to return to the United States, if at all possible, and raise his children there.

One of the reasons the Court finds this to be the case is because of respondent's close relationship with his parents and his dependency on his parents, including financial dependency to some degree and, even more so, dependency in helping raise the children. And emotional dependency, as well, as fairly reflected in the point that petitioner made in her [20] message to Mr. Rosengart that, in her own words, respondent's "responsibility to family trumps personal freedom." In the Court's view, part of this sense of family dependency and responsibility was that it was always his intent to return to the United States and raise his children there.

The short of all this is that the Court finds that at the time the couple left for Switzerland, they had a shared intention to raise their children in the United States and make the United States the children's habitual residence, and that, for different reasons, they each continued to adhere to that intention even as their marriage deteriorated and they became at odds in other respects.

Now, I want to make clear that, in reaching that conclusion, I do not credit respondent's claim that his hasty departure from Switzerland to come with the

children back here to the United States just some weeks ago was prompted by a fear, as he claimed, that petitioner was out of control and would behave inappropriately towards the children. To be frank, this is the portion of the respondent's testimony that I found least credible. There is nothing in the record to suggest that the petitioner has anything other than love for her children. It is true that she has sometimes put her own priorities first, as respondent has sometimes also done; but we are all human beings and we don't always sacrifice our own desires to those of even our children. But it seems clear to [21] me that when respondent permitted the children to visit petitioner for three consecutive days immediately prior to his taking them to the United States, he had no belief that she was out of control or would do any harm to the children. I think on the contrary he was motivated by forum shopping, and if I had to reach that aspect of the elements of the claim, petitioner would be in better shape; but I don't reach that aspect because petitioner has failed to prove the threshold element of habitual residence.

Lastly, under the precepts of the *Gitter* case, I have to look, not just at the parents' shared intent, but also at whether the children, who at the ages of two and four do not have well developed intentions of their own as to habitual residence, nevertheless, could be said in some sense to have become so acclimatized to Switzerland as to make it their habitual residence, notwithstanding their parents' shared intent to return them to the United States. But this would only be dispositive if the evidence pointed, in the Second Circuit's word, "unequivocally" to the conclusion that this acclimatization has overcome the parents' intent. This doctrine of acclimatization presupposes, I think,

children considerably older than the ones we have here. Here, the children had not even reached the stage where their interactions with peers and things like years of schooling, close relationships with other school children, language [22] considerations and many other factors could fairly warrant a finding that they had somehow become more Swiss than American. Rather, they were in the position, not unlike children raised to parents in the foreign service or the military, who may be spending a few years of their young lives abroad but whose habitual residence is nevertheless, unquestionably, the United States.

Because I conclude that petitioner has failed to prove that the habitual residence of the children was Switzerland, and since I conclude instead that it was the United States, I don't have to reach any of the other elements of the petition, nor do I reach petitioner's motion to vacate the state court proceedings.

The only other open item is the passports. I will continue to hold the passports until I render the final judgment. At that point the respondent can reclaim the passports unless petitioner seeks some sort of stay pending appeal, in which case it will be a determination that will have to be addressed at that point.

So, for all the foregoing reasons I will dismiss the petitioner with prejudice but that will not take final effect until I enter the final judgment after I make the edits which will be approximately a week from now.

All right. Anything counsel need to raise with the Court?

[23]

MR. SALTZMAN: No, thank you, your Honor.

MR. MAYEFSKY: No, your Honor.

THE COURT: Thanks a lot.

(Adjourned)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of March, two thousand eleven,

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Ava Heydt-Benjamin,

Petitioner-Appellant,

v.

Thomas Heydt-Benjamin,

Respondent-Appellee.

ORDER

Docket Number:
10-1780

Appellant Ava Heydt-Benjamin filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk
[SEAL]
/s/ Catherine O'Hagan Wolfe

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[EXCERPTS OF DIRECT TESTIMONY OF AVA HEYDT-BENJAMIN]

Ava Heydt-Benjamin,

Petitioner,

v.

Thomas Heydt-Benjamin,

Respondent.

10 Civ. 0881 (JSR)

New York, N.Y.
March 8, 2010
10:15 a.m.

Before:

HON. JED S. RAKOFF,
District Judge

APPEARANCES

NEIL SALTZMAN, ESQ.
BRADLEY ANDREWS, ESQ.
Attorneys for [Petitioner]

SHERESKY ARONSON MAYEFSKY & SLOAN LLP
Attorneys for [Respondent]

BY: ALLAN MAYEFSKY
HEIDI HARRIS

SOUTHERN DISTRICT REPORTERS, P.C.

[2]

(In open court; case called)

THE DEPUTY CLERK: Counsel please state your names for the record.

MR. SALTZMAN: Good morning, your Honor. Neil Saltzman for petition[er], Ava Heydt-Benjamin.

MR. ANDREWS: Good morning, your Honor. Brad Andrews also for the petitioner.

MR. MAYEFKSY: Good morning, your Honor. Allan Mayefsky for respondent, Thomas Heydt-Benjamin. And my partner Ms. Harris and Mr. Heydt-Benjamin is [sic] here as well.

THE COURT: Good morning. I am sorry for the delay. Unless there is something counsel needs to address, I am ready to hear the first witness from the petitioner.

MR. MAYEFSKY: Your Honor, may I just raise one point?

THE COURT: Yes.

MR. MAYEFSKY: I was served last night with a trial memorandum from the petitioner. I don't [kn]ow if it has reached the Court, but I would like an opportunity at the close of the hearing to put in a memorandum also, maybe a posthearing memorandum as well.

THE COURT: I haven't seen this until right now. By what authority did you file that?

MR. SALTZMAN: There wasn't a specific court order that requested it. Your Honor's rules, which I understood had been somewhat modified for this

particular proceeding in light [3] of the expedited nature, allowed for pretrial briefing. We thought it would be helpful to the Court. We certainly have no objection —

THE COURT: In other words, what you did, just so I am clear, on the morning of an evidentiary hearing that was scheduled sometime ago without any permission of the Court, without any notice to your adversary, and without any opportunity for either the Court to read it or your adversary to respond, you took it upon yourself to unilaterally arrogate to yourself the authority to file a 23-page memorandum.

Do I have that right?

MR. SALTZMAN: Well —

THE COURT: Don't I have that exactly right?

MR. SALTZMAN: I am not, with all humility and due respect, your Honor, sure that the absolutely [sic] nature of the language that your Honor used to describe it is —

THE COURT: I thought it was rather modest. We could have a more [sic] discussion about whether sanctions should be imposed for your filing without legal authority and without authority from this Court a brief whose only apparent purpose would be to sandbag your adversary.

MR. SALTZMAN: That truly was not the purpose.

THE COURT: Do you want to withdraw it?

MR. SALTZMAN: If your Honor suggests that we withdrew [sic] it, we will. Our intention [was] to provide helpful material to [4] the Court.

THE COURT: Helpful to the Court when I had no opportunity to read it before this hearing. How helpful can that be?

MR. SALTZMAN: It could be useful posttrial, your Honor.

THE COURT: If you had wanted a posttrial opportunity to brief issues, of course you would have raised it here at the end of the hearing this morning.

By the way, I think "trial" is a little inexact. This is an evidentiary hearing. It is not in the usual sense a trial, but I won't quibble about that.

If you had wanted posthearing or posttrial opportunity to file a memorandum, you would have requested it today and I might have or might not have granted it.

MR. SALTZMAN: Taking your Honor's admonition to heart, we are happy to and certainly willing to withdraw this memoranda [sic] and to join our adversary in a request to file a posttrial memorandum.

THE COURT: I will deem it withdrawn. We'll see at the end of the hearing whether it should be refilled as a posthearing memorandum.

MR. SALTZMAN: Does Mr. Mayefsky have anything else?

THE COURT: He is perfectly happy with the one he raised.

[5]

MR. SALTZMAN: We're ready to proceed. We do have a binder of premarked trial exhibits —

THE COURT: Fine.

MR. SALTZMAN: — that we would like to hand up to the Court as well as respondent's counsel.

THE COURT: Yes.

MR. SALTZMAN: We may supplement it slightly as we get to the end of the testimony of our witness.

We're ready to call our first witness, Ms. Ava Heydt-Benjamin.

THE DEPUTY CLERK: Please raise your right hand.

AVA HEYDT-BENJAMIN,
called as a witness by the Petitioner,
having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SALTZMAN:

Q. Good morning, Ms. Heydt-Benjamin.

A. Good morning.

Q. Where were you born and raised?

A. I was born in Norwalk, Connecticut, and I was raised in Connecticut in Norwalk.

THE COURT: You might want to draw that microphone a little closer to you. Thank you.

Q. What is your relationship to the respondent?

A. He is my husband.

* * * * *

[8]

* * * * *

Q. What did you do with your belongings in Massachusetts when you left for Switzerland, and you said you left in July, I believe?

A. I did. I arrived on July 4th.

[9]

Q. What did you and Tom do with the items that you had in Massachusetts?

A. We put them in a storage locker.

Q. You were anticipating that you would return a few months later and —

A. And take up an apartment.

Q. Regarding your items what would you be doing?

A. Regarding our stuff in storage, we would – when we – if we returned to the U.S.A., we would be using our stuff.

Q. What actually did happen tell me?

A. What happened? We arrived in Switzerland. I was pregnant. I followed Tom with my daughter and I later gave birth in Switzerland in Zurich. We – Tom was offered a contract with IBM.

Q. Let me ask you a few more specific questions. When was your son born in Switzerland?

A. September 29th, 2007.

Q. So two months after your having arrived there your son was born?

A. Yes, he was.

Q. You said that Tom was offered a job by IBM?

A. He was offered a job by IBM and he had a falling out with his advisor with University of Massachusetts so he was also offered a position to finish his Ph.D, which was taking a long time, at the university in Zurich, at ETH.

[10]

Q. Did you discuss these offers together?

A. Yes, we did. We talked about moving to Switzerland and living there, which we then did. We – he decided to take a three-year contract with IBM and ETH.

Q. So you were scheduled as of sometime between June '07 and – if I understand you correctly sometime between June '07 and September '07 or October '07 you and Tom decided – your plans had changed?

A. Yes.

Q. You had been intending to be in Switzerland for three months and your plans changed?

A. Yes.

MR. MAYEFSKY: Objection, your Honor.

THE COURT: Well, it is leading. It is compound. It is rhetorical. It is argumentative. It assumes facts not in evidence. Shall I go on, counsel?

MR. SALTZMAN: Okay.

THE COURT: Please rephrase.

MR. SALTZMAN: I will rephrase the question.

Q. The decision to accept this job offer was made while you were where?

A. I was in Zurich.

Q. This was a joint decision?

A. We discussed moving to Switzerland and Tom taking up his program at ETH and working at IBM.

[11]

Q. What did he do regarding his position at the University of Massachusetts?

A. He left his position at the University of Massachusetts.

Q. What was the next step that he took in terms – when did you next leave Switzerland?

A. We left Switzerland when I was able to travel and we spent the winter holiday, it was probably November to December, I can't recall the exact dates, babies by that point, and we visited with his parents and he commuted back and forth to Massachusetts to finish getting his office cleaned out.

Q. What did you do with the belongings?

A. We left them alone and he said things like it was an albatross around his neck. We had things in storage that he hoped that he never wanted to see. He hoped it would burn down. He was done with it. Once we moved to Switzerland that was going to be our move.

Q. Did you ship anything to Switzerland?

A. Yes, we did. IBM paid for it.

Q. What items roughly?

A. Tom shipped his monitors, computer equipment. We shipped clothing, books, the kids' toys, sippy cups, diapers. You name it. Pretty much we shipped a bun[ch] of stuff that we needed to have our apartment. The personal effects. [T]hen we bought furniture when we got there.

Q. When you got where?

[12]

A. Well, so we – when we first arrived back, we lived in – we had a – we didn't find an apartment immediately.

Q. Can you locate me in place and time, please?

A. We arrived back in Switzerland in January of 2008 and Tom took up his contract and we didn't have a permanent apartment yet because the Swiss real estate is very, very tight. And so we stayed in a youth [hostel] for two weeks and then we got a sublet apartment. And Tom purchased – before we even got the sublet apartment, Tom purchased the services through IBM of a relocation agent to find us a permanent apartment. And we wanted to have an apartment that would be safe for the kids, big enough for the kids, and a nice place, someplace we could really settle down and call home.

We looked and we were really picking and the first time we didn't find anything. So we took a sublet for six months very close to – not close to IBM but close to ETH, the university. And it was – it was, you know, a pretty standard Swiss apartment. It made [do] for six months while we were looking for something really, really good which we found with the help of a second round with the relocation agent because we wanted something that met our criterion.

Q. The relocation agent found a second apartment for you?

A. Yes, she did.

Q. That began approximately in what month and year?

A. I think it was July 2008. Somewhere in there.

[13]

Q. Did you sign a lease?

A. Yes, we did.

Q. Did the respondent also sign the lease?

A. Yes. We both did.

Q. Is that the apartment that served as the family residence?

A. Yes.

Q. Do you continue to have a lease to that apartment today?

A. Yes, I do.

Q. That lease, was it something that was annually renewable?

A. Yes.

Q. At your option?

A. Yes.

Q. And did you furnish that apartment?

A. Yes, we did.

Q. What certain items did you —

A. We went to IKEA and we bought a bed, we bought dressers, we bought pots, pans, cutlery, kitchen knives, dish sets, we bought dressers for the children, curtains, mirrors, decorations, a sofa. We – from when we first stayed in Richterswil when Tom came for the internship, we had already purchased a crib and television and we left in storage there in that apartment for when we returned. We had carpets, plants, the standard things along with Tom's motorcycle as well.

Q. Other than the items that you mentioned that were in a storage locker in Massachusetts, did you retain any other – do [14] you have a lease to any property in the United States?

A. No.

Q. Did you own any property in the United States?

A. No.

Q. Did you own a car that you had left behind in the United States?

A. We had the use of a car that was owned by Tom's father and paid for by Tom's father and insured by his father. We had exclusive use of it since I think it was probably '99.

Q. Do you have —

A. Not '99. Since probably 2002 when we got married. He sold the car when we left for Switzerland permanently.

Q. When was that?

A. That was before January of 2008.

Q. The car was sold?

A. It was traded in and he gave the money to Tom.

Q. So after January 2008 did you and or Tom have a car in the United States?

A. No.

Q. Did you have any other assets of significant worth in the United States?

MR. MAYEFSKY: Objection.

THE COURT: Well, I think you have to define "significant."

Q. The items that were in storage in Massachusetts, are they [15] still in storage today?

A. I have no idea. We haven't really discussed it too much. It was a point of contention. Tom really said that he wanted just to be done with it and again and again said he would like to —

MR. MAYEFSKY: Objection, your Honor. The question simply was are they still there, and the witness is going on to something —

THE COURT: I will let it stand. Let's go on to another question.

Q. Have you taken any actions to take the items out of storage since?

A. No.

* * * * *

[25]

* * * * *

[25:11]

THE COURT: Did you get a permanent residence?

THE WITNESS: I got a[n] Ausweis B permit.

THE COURT: What is that?

THE WITNESS: It is a residence permit that piggybacks off of my husband's residence permit because he is employed there and it allows me to stay there and live there in Zurich. It is renewable

annually. And with a[n] Ausweis B permit I would be allowed to work there.

THE COURT: Okay.

THE WITNESS: And my kids —

THE COURT: You answered the question.

BY MR. SALTZMAN:

Q. That visa is called — can you spell that for me?

A. I am terrible — A-u-s-w-e-i-s, A-u-s-w-e-i-s. I am sorry. My spelling is not great.

[26]

Q. That is the type of residency —

A. Yes, the Ausweis.

Q. And your husband to your knowledge received one as well?

A. We all had to have one in order to stay.

Q. Your two children had to have one as well?

A. Yes.

Q. What other steps, if any, did you take at that time to become acclimated to life in Switzerland?

A. Myself personally?

Q. Your family.

A. My family. Well, we explored the neighborhood. We — Tom brought Rosetta Stone. We — Tom took German classes through his employer. I took the kids to museums, to the park, we went on family trips, we grocery shopped. I learned as much German through interaction with people as I could. Tom looked into all the local laws and customs and took out books on

Swiss traditions. We went to family fairs and this kind of thing. We just generally familied around. We – so we went to company outings. We went and interacted with people.

Q. What were your discussions with Tom concerning what the duration of your stay in Switzerland would be like?

A. Well, he talked about staying in Switzerland because he really – he felt that – he told me again and again he really loved Switzerland. He felt like the culture really fit his personality type. He looked into the local laws, he looked [27] into the governmental laws, and applying – he said that one day he would consider applying for residency permanently to Switzerland as a citizen. He said he had looked into the citizenship laws and discovered that if you – you could apply canton by canton, and he said the local government was very exciting to him and it was cool that the federal government that you could get recognized as a citizen on a local level because you would be involved with your town. So he really got into that and it was really exciting.

Q. What was your position regarding the duration of your stay in Switzerland?

A. It was open indefinitely. We talked about – he talked about post doctorate in Switzerland. He talked about continuation with his –

MR. MAYEFSKY: Objection. The question was what was her position. She is talking about what he talked about.

THE COURT: Sustained.

Go ahead, counsel.

Q. How long did you anticipate being in Switzerland at that time?

A. We anticipated being there at least three years while Tom was finishing his Ph.D. We talked about staying longer.

Q. Did you have any definite plans as to what would happen at the end of those three years?

A. We talked about going – the way it worked I was going to [28] follow Tom with the kids anywhere that he got employment and that had to be open because of the nature of his work and we – he said he would try Switzerland and the local areas because he liked his program at ETH. He had contacts there. He enjoyed the people he worked with. He had problems at the University of Massachusetts. It was [an] open possibility.

Q. Did you have any fixed place to return to in the United States at the end of those –

A. No.

Q. – Ph.D years?

A. No.

Q. You mentioned that Tom bought a vehicle in Switzerland?

A. Uh-huh.

Q. What was that?

A. He bought a Peugeot motorcycle.

Q. He obtained a license to operate it?

A. Yes.

Q. Do you know if this vehicle was insured?

A. I believe it was required – he was required to insure it.

Q. What did your family do for medical insurance while you were in Switzerland?

A. We had medical insurance that covered us in Switzerland, but I believe it was carried through a German company because it was cheaper than the Swiss insurance. Tom carried a Swiss insurance for him because his medications were not covered [29] under the German – sorry. It wasn't his medication. I think his therapy was not covered.

MR. MAYEFSKY: Objection, your Honor.

THE COURT: Sustained.

Q. I would like you to look at Exhibit 5, please.

Can you identify this document?

A. Yes, I can. This is a receipt for the space rental of a room in a community center where I had a play group that I started.

MR. MAYEFSKY: Sorry?

THE WITNESS: A receipt for the rental of a space in a community center where I started a play group for the children.

MR. SALTZMAN: I move to have this admitted as a business record, your Honor.

MR. MAYEFSKY: Your Honor, the document is in German.

THE COURT: That's true. You don't read German?

MR. MAYEFSKY: I am afraid not. I did at one time, but not anymore.

THE COURT: However, I think my German is somewhat rusty as well, but I think it is sufficiently understandable and can be challenged if necessary as to authenticity. It is a business record so I will receive it. Exhibit 5 is received.

(Plaintiff's Exhibit 5 received in evidence)

BY MR. SALTZMAN:

Q. Did your children in fact participate in a play group? [30]

A. Yes.

Q. During approximately what dates did they participate?

A. From the time I started this on – it was May I think. May until – I think maybe I quit it in May. I am sorry.

Q. If you look at the document maybe that will help.

A. Sorry.

Q. Would that assist?

A. Yes, that would.

THE COURT: Do you read German?

THE WITNESS: No, not well. I get around.

THE COURT: A good thing about this exhibit is that no one understands it. It appears to bear the date of –

THE WITNESS: May 13th.

THE COURT: 2000 –

THE WITNESS: 2008. I ran it for – it was spring through summer.

THE COURT: That's good enough. The reason I admitted it, just so the record is clear, is that it includes – this is your handwriting, yes?

THE WITNESS: It is my handwriting.

THE COURT: Your handwriting. It includes the well known German phrase "play group," which does give some substance to this exhibit.

BY MR. SALTZMAN:

Q. So your recollection, did you state it was spring and [31] summer?

A. It was – it was mostly through spring. I feel like officially – I made it official then. I had actually had it going a little bit then but it was on a trial basis. Then she had – I had gone there and given her a key deposit and she gave me the room and we – I had to round up some mommies and we started coming with the kids. And when we went back for a wedding, I – when I came back, we had our permanent apartment and I wanted to get really into that neighborhood a little, you know. And I let the play group because I would meet with mommies and I didn't think that I wanted to pay the money for the room if we could just meet at the park and go places. It was really to meet people and to explore the local lay of the land. We were doing that on our own by then.

Q. The children had a physician in Switzerland?

A. Yes.

Q. Did they get regular checkups there?

A. Yes.

Q. The children, did they have friends in Switzerland?

A. Yes, they did.

Q. Was this during the period of May?

A. Sure. Absolutely.

Q. Was it through the period of your stay through Switzerland?

A. Yes. They have always had friends in Switzerland.

Q. You said that you had arrived in Switzerland initially with [32] your family in approximately July 2007. Between July 2007 and January 28th, 2010, how much time did your children spend outside of Switzerland approximately?

MR. MAYEFSKY: Objection, your Honor.

THE COURT: Grounds.

MR. MAYEFSKY: There is no foundation how this witness would even know that answer. She wasn't there.

THE COURT: Lay a foundation if you can.

BY MR. SALTZMAN:

Q. You lived in Switzerland personally?

A. Yes.

Q. You already testified between July 2007 and approximately November 2007 and then again from January 2008 until when did you next leave Switzerland?

A. I left Switzerland in February of 2009.

Q. Between January of 2008 and February of 2009, how much time did the children to your knowledge spend outside of Switzerland?

A. Between January and February.

Q. Between January of 2008 and February of 2009 –

A. We came back for about the month and a half or two months. I believe we had a wedding to go to and we spent some time at the grandparent's house.

Q. When was that approximately?

A. That was during the summer.

[33]

Q. Can you give me months?

A. The wedding was in August. So it was August and then June. July and August, I think.

Q. So July 2008 to August 2008?

A. Yeah. Somewhere in there.

Q. Are you aware of the children having been outside of Switzerland during the years between January 2008 and February 2009?

A. I am not aware of any other trips they may have taken.

Q. Were you living with the children January 2008 and February 2009?

A. Say that again?

Q. Were you living with the children in Switzerland between January 2008 and February 2009?

A. Yes, absolutely.

Q. And again between July 2007 and November 2007 were you living in Switzerland with the children?

A. July 2007 to November, yes, I was.

Q. Between those months did the children to your knowledge spend any time outside of Switzerland?

A. From July 2007 to November 2007, no.

Q. One of the children was born in Switzerland during that period, correct?

A. Yes, my son.

Q. I.H-.B.?

[34]

A. My son.

Q. L.H.-B.

* * * * *

[42] * * * * *

[42:2]

Q. Did you discuss the possibility of post doctoral work?

A. Yes. He discussed doing a post doc either at ETH or University of Leuven. He has friends there. He said he liked the identity of the continuity between those two universities. We had discussions about that.

Q. Did you express a preference for any particular place?

A. He said he would like to he said if they offered him a nice position, he would like to continue at ETH. He said it would be good for him.

Q. Did you discuss the children's –

A. Yes.

Q. – residency in Switzerland?

A. Yes, we did. We talked about all kind of things. I said that I was excited to come back. He said that was good because that is – he told me that the kids were not going anywhere, that we lived there as a family at the time that I left and that the kids were installed there, that they – this was their home and that we were going – that the kids were going to stay in Switzerland and that is why he hadn't let me take them with me.

Q. When did you in fact return to Switzerland?

A. I returned in September of 2009.

Q. Of 2000?

A. 2009.

[43]

Q. Where did you move? Where did you live?

A. I lived in Zurich. I rented a room in – an apartment that I found online that was in the neighborhood about a six-minute walk to Tom and my familial apartment.

Q. How soon after arriving did you see your children?

A. When I first arrived, I called Tom and I wanted to see them immediately but he told me I could not. He said that if I came near the apartment, he would take the children and disappear and I would never see him again. And it scared me and I called the embassy and I said that my husband had threatened to take away my kids and disappear and he had – he knows how to work with passports. He is a security expert and I was really nervous basically that he would – I had no idea. The imagination goes a little wild at those times. I was scared he would take the kids and really

disappear. He threatened to abduct them and if I came near the apartment. And I called the police on the advice of the embassy.

Q. Did you say you did call the police?

A. I called the police on the advice of the embassy and they said he can't do that and I said I didn't think he could. I never waived my parental rights. I wanted to see my children. We were still legally married. I said I don't want to bust in there like gangbusters. I wanted to see my kids. I called Tom and I said – pardon me. I called Tom and said, I would like to see the kids. I will call the police if you won't let me [44] see the kids and I will see my children. I am worried. I haven't seen them in a really long time. I really want to have a relationship with my children. I said I really just want to be civil. Can't we handle this like grownups and meet somewhere? And he eventually said, Okay, that it wouldn't be a good thing if I busted in there with the police.

I suggested we meet at the train station in the neighborhood and he and I met to discuss it and I – we talked about a lot of things. It was a fairly amicable conversation. I immediately started seeing he was still the same man that I left. He was still drinking, a lot of issues with that when we were married. He started – he told me he had stopped drinking and smoking and doing drugs. On the street there he was drinking again.

MR. MAYEFSKY: Objection, your Honor.

THE COURT: Well, it is well beyond the scope of the question. Put another question.

Q. So after having contacted the police and having contacted Tom and had a conversation with him,

approximately what date was it when you got to see your children?

A. It was shortly after our meeting. We took them to a museum. He arrived with the kids at the museum. We met there. We had a really nice day at the museum.

Q. Do you know approximately what date it was?

A. Early September. I don't know the exact date. I am sorry.

[45]

Q. Can I refer you to Exhibit 8, please. I would like you to look at the bottom half of what is marked as Exhibit 8.

A. Yes.

Q. The line that starts on Saturday, September 12th, 2009.

A. Yes.

Q. Can you identify the writing that appears from those words down?

A. Yes. This was an e-mail sent from my husband to me after we had some time that we spent with the kids. I believe it was that day, yes.

Q. You received this e-mail?

A. Yes, I did.

MR. SALTZMAN: I move that portion of the document be admitted into evidence, your Honor.

MR. MAYEFSKY: No objection, your Honor. If [sic] fact, I would ask that the entire document be admitted.

THE COURT: Any objection?

MR. SALTZMAN: No objection.

THE COURT: The entirety of Exhibit 8 is received.

(Plaintiff's Exhibit 8 received in evidence)

Q. Could you, please, the writing that is below the portion of the document –

THE COURT: I have read it. So this was September 12th, 2009.

Q. What do these two e-mails, Tom's e-mail to you and your [46] e-mail to him, relate to?

A. They relate to a day we spent together with the children at the museum.

Q. How would you characterize that visit?

A. It was a very, very pleasant visit. It was amazing. The kids were great. We played and had a good time. There were a lot of hugs and kisses. It started really –

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[54]

* * * * * *

[54:11]

Q. Did you make arrangements to see the children when you returned?

A. Yes.

Q. Can you describe those to me, please?

A. We talked about, you know, continuing with me seeing the kids frequently and increasingly frequency [sic]. Tom talked about how he had been really behind

in work and he eventually quit at IBM and took ETH solely.

THE COURT: I need to once again ask you to focus on the question. The question was what arrangements were made.

A. We talked about, you know, continuing going on with the way things had been. But also very shortly thereafter I started having the kids overnight and they started coming over to my house and having suppers and sleeping over and I would pick them up at the daycare and bring them back and forth.

[55]

Q. Did those exchanges progress from your view amicably?

A. Fairly.

THE COURT: Or as I think the dictionary would say amicably.

MR. SALTZMAN: On the transcript it will read the same.

THE COURT: All right.

A. Sometimes yes. Sometimes no. Sometimes very no. Sometimes very yes.

Q. Were the children in any kind of organized activities at this time?

A. Yes. They went to the daycare. They would take them out to the woods, out to the gardens. They would do those kinds of things. They had friends they would play with.

MR. MAYEFSKY: Objection. Not responsive, your Honor. The question was organized.

Q. You mentioned daycare.

A. Yes.

Q. How often was that?

A. That was two days a week they would go to daycare.

Q. What did they do the other three days?

A. The other three days they lived at Tom's house with the au pair and he worked.

Q. Was the daycare with the same daycare providers or did they vary?

[56]

A. It was the same daycare provider consistently.

Q. Did the group of children remain constant?

A. Pretty much, yeah.

Q. Did you have any interaction with the daycare providers?

A. Yes, I did.

Q. What was your interaction?

A. I would pick up the kids. I would talk with the people. I would occasionally talk with the other mothers, the parents, play with the kids. I would bake cupcakes and have birthday parties. That kind of thing.

Q. Did the daycare providers give you any kind of feedback in terms of how your children were doing there?

A. Yes, they did. They would give me –

MR. MAYEFSKY: Objection, hearsay.

THE COURT: Sustained.

MR. SALTZMAN: Just in terms of whether she got updates or not, your Honor.

THE COURT: Did you get updates from the daycare center, yes or no? Just answer that yes or no.

THE WITNESS: Yes.

BY MR. SALTZMAN:

Q. What was the approximate schedule you were having with the children after your return to Switzerland in December?

A. Well, it started out where I would see them very frequently during the weekdays. And then after a very short time, I [57] started having them overnights at my house. On – it would be the day – I picked them up after daycare and I would have them generally on the Thursday between daycare and the next day of daycare.

Q. Can you give me an estimate as to when those overnight visits began?

A. The overnight visits began without fail on I.H.-B.'s birthday which is December 30th. She asked me if she could –

THE COURT: You answered the question. You don't have to give the history of the world in every answer.

Q. Did these overnight visits happen at regularly scheduled times?

A. We would schedule every week to have our share of time. He would get some days. I would get some days.

Q. How was the schedule worked out?

A. Sometimes by e-mail. Sometimes verbally. A lot of times we would start by e-mail or phone. Then we would see each other face-to-face, drop off or pick up, and we would alter our schedules.

Q. What was the status of the family's residency permits at this time?

A. We were residents. We had B Ausweis.

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APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[EXCERPTS OF DIRECT TESTIMONY OF THOMAS HEYDT-BENJAMIN]

Ava Heydt-Benjamin,

Petitioner,

v.

Thomas Heydt-Benjamin,

Respondent.

10 Civ. 0881 (JSR)

New York, N.Y.
March 9, 2010
10:15 a.m.

Before:

HON. JED S. RAKOFF,
District Judge

APPEARANCES

NEIL SALTZMAN, ESQ.
BRADLEY ANDREWS, ESQ.
Attorneys for [Petitioner]

SHERESKY ARONSON MAYEFSKY & SLOAN LLP
Attorneys for [Respondent]

BY: ALLAN MAYEFSKY
HEIDI HARRIS

SOUTHERN DISTRICT REPORTERS, P.C.
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* * * * * * *

[246:22]

Q. Now, did there come a time when the two of you were married?

A. Yes.

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Q. What was that date?

A. We were married on June 22nd of 2002.

Q. Where did that take place?

A. Sherman, New York.

Q. Where did you live just at the time you got married?

A. We were living in Mount Vernon, New York.

Q. At that the time were you still working as a teacher?

A. That's correct.

Q. Now, had you and the petitioner been living in New York prior to the date of your marriage?

A. That's correct. We lived for about two years in New York prior to my marriage.

Q. Now, where was the place you were living in Riverdale?

A. Mount Vernon, New York. It is a short drive from my place of work.

Q. How long did you continue at Riverdale?

A. I worked there for a total of four years.

Q. What did you do after working at Riverdale?

A. I left Riverdale in order to pursue graduate studies. I entered combined masters Ph.D program at the University of Massachusetts, Amherst.

Q. Before that while you were still working at Riverdale, where did you live?

A. For one year before I resumed studies before I started my graduate program, we lived in Silvermine, Connecticut.

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Q. Was that a place that you owned or rented?

A. It was a house that was owned by Ava's mother.

Q. Was there a reason that you moved from Mount Vernon to Connecticut?

A. Yes. The primary reason that Ava had been given an opportunity to study for one academic year at Yale University. And the place Silvermine, Connecticut was close enough to both my job and the place where Ava was studying for – to permit me to continue to work while she pursued her studies.

Q. Now, when you began attending University of Massachusetts, where did you then live?

A. We moved to Hadley, Massachusetts which is the town next to Amherst, Massachusetts.

Q. Do you remember the date that you started living in Hadley, Massachusetts?

A. We moved there in June or July. I don't remember exactly which date. That would have been – I have to think. I always think of academic years. I am a life-long academic. The academic year of 2005[-]2006. No, sorry. That would have been academic year 2004[-] 2005.

Q. So in or about September 2004 beginning the academic year?

A. We moved there a couple months early so we would have everything set up and then we took some vacation in New York before coming back and starting my studies.

Q. And what did you obtain to live in Massachusetts?

[249]

A. We rented an apartment.

Q. Was it furnished?

A. It was not.

Q. Did you purchase furniture for it?

A. We purchased furniture sufficient.

Q. Where is that furniture today?

A. It is in storage in Massachusetts.

Q. Now, how long was the masters program?

A. So it was – I combined masters and Ph.D program. I spent three years in the program and the program has no fixed length as is common in some kind of Ph.D programs. I spent three years in the program.

Q. So when did you finish in the program?

A. So after my third year in the program, I received my masters degree which in the program the way they do it at U Mass this is one step along the road. After that you can leave with your masters or continue studying there for your Ph.D. But at that point after I completed my masters, which was in May of 2007.

Q. So between the time in 2004 that you moved to Massachusetts and started the program in May or June of 2007, did you spend any time in New York?

A. Yes. We spent a significant portion of our vacations in New York.

Q. When you came to New York, where did you go?

[250]

A. We would frequently come down to spend time with my parents. And in the summer we would notably spend time in Sherman, New York, at the same place where we were married. In fact, one summer in addition to our vacation time, I also worked for – I telecommuted for a little more than a month from that place in Sherman, New York where we were married.

Q. When was your first child born?

A. I.H.-B. was born on December 30th, 2005.

Q. [Where w]as she born?

A. She was born in Massachusetts.

Q. When you completed your degree in 2007, where did you and your wife and your daughter go?

A. We went to – well, first, we moved out of Massachusetts. So we took everything out of our apartment and put it in storage. I shouldn't say everything. We took things that we knew we wouldn't need for a while and we put them in storage there. Then we brought everything else down to my parents' place in New York.

Q. Did you store items in New York?

A. Yes, we did.

Q. How much time did you or your wife or your daughter spend in New York after you graduated from your masters degree or received your masters degree?

A. So, yes, I stayed there about a week and then I headed to do a little bit of business travel and then to – then on to [251] Switzerland. They stayed there with my parents in New York for two and a half weeks at that time.

Q. Now, where were you going after Massachusetts, or after this stay in New York following your masters degree?

A. That's right. So I went for one week to Toronto just for a conference then after that I went to begin my internship with IBM research, Zurich Research Laboratory.

Q. When did you determine that you were going to this internship?

A. I applied for the internship in the winter of – I guess I must have applied to December of 2006. I learned that I had been accepted to the program in the midspring of 2007.

Q. How long was the internship?

A. It was to be a three-month internship.

Q. When was it specifically scheduled to start?

A. It was scheduled to start I believe the third week of June, 2007.

Q. Now, did you and your wife discuss your taking this internship or your applying for this internship before you did?

A. Yes, we did.

Q. Can you tell me what you and she discussed on this topic?

A. There were many things to discuss on this topic. The most important of which was the birth of our son. It was tricky because my son was to be born shortly after the end of the original time that the internship was to be performed. So we [252] had a difficult decision to make whether to have my son be born in the U.S. and have her stay here and I would return to be with them around the time of his birth or be in Switzerland for his birth. There were many factors in the decision. But among them was the fact that – shall I continue?

Q. Yes, please.

A. My son had a birth defect which could have been life threatening and it so happened that this was one of many factors but it was certainly an important factor to me. It just so happens that the pediatric hospital in Zurich has the world-leading treatment for that condition. We didn't wind up needing to do that because very fortunately the condition spontaneously reversed itself.

Q. In 2007 when you were going for this internship was it a finite trip to Zurich?

A. Yes.

Q. Did you discuss what would happen at the end of that internship?

A. Our attempt [sic] at that point was at the end of the internship we would return to Massachusetts where I would resume work on my Ph.D.

Q. What occurred when you went to Zurich?

A. Well, I discovered that I was getting good work done there and that I enjoyed my colleagues very much. Fortunately they also appreciated my skills and apparently liked having me [253] around. So that they let me know that they would be pleased to receive any application I might make for a three-year predoctoral research program there at the lab.

* * * * * *

[258]

[258:4]

Q. The children came under the same auspice?

A. The children were able to enter on our visas. They didn't need an independent visa. However, they did need their own Auslander Ausweis.

Q. When you went back to Zurich in January of 2008, where did you live initially?

A. Initially when we first got there, we moved into a youth [hostel] and we stayed at the youth [hostel] for a period of time. I don't remember exactly how long. My memory is correct I think it was closer to three weeks than two weeks. And then after that we moved from the youth hostile to a sublet still within the city of Zurich but in a different borough, if I can translate the word *kreis* as borough.

Q. How long did you stay in the sublet?

A. We stayed in that sublet until early summer. So I want to say it was around the end of May, beginning of June that we lived in that sublet.

Q. Did you then find additional housing or new housing?

A. That is right. We found a new rental apartment at that time and what happened was I basically moved a bunch of our stuff into the new apartment. Very shortly before [A]va and the children returned to spend time in the United States with the [259] idea that I could try and set it up and make it nice for them before they came and moved back into the new rental.

Q. We'll get to that in a second. What belongings did you bring with you to Zurich in 2008?

A. When we went back to Switzerland in 2008, we brought with us mainly supplies for the children such as clothing, a double stroller, and some various supplies for the kids. We brought some clothing and then the balance of the rest of what we brought with them is stuff pertaining to my work. Things like textbooks, copies of papers that I reviewed, and a fair amount of electronic equipment that pertained to my research.

Q. Would that be like computer equipment?

A. Yes.

Q. Did you also bring some musical equipment?

A. I did. I brought one of my synthesizers and one mini keyboard.

Q. Did you bring furniture?

A. We did not bring furniture.

Q. You left the furniture, I think you said before, in storage in Massachusetts and New York?

A. That's right. I also left the rest of my instruments in New York.

Q. When you say "instruments," you mean musical instruments?

A. Yes, musical instruments. In particular I was afraid to bring overseas my hand built analogue synthesizer. I have an [260] analogue synthesizer and designed part of myself that I left in the U.S. knowing that I would be using it mostly when I eventually returned here.

THE COURT: On the theory that much modern music can be compared to an act of terrorism.

THE WITNESS: I am afraid that I have had critics make similar analogies, your Honor.

Q. Did you purchase furniture in Zurich?

A. Yes, we did.

Q. How much did you purchase?

A. We purchased enough to basically furnish the apartment. We went to IKEA and spent two to three Swiss francs which is essentially the same of [sic] two and $3,000.

Q. How old were the children when you arrived in January of 2008?

A. So L.H.-B. would have been between four and five months old and I.H-B. at that point would have been two and a bit

Q. Now, did you enroll I.H.-B. in any preschool program at that point?

A. We did not.

Q. You heard your wife testify about a play group during that 2008 year – year 2008?

A. Yes.

Q. Did that take place?

A. It did to a very limited extent.

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Q. Can you tell us what happened?

A. Well, I was quite pleased that Ava was interested in starting this group. I was hoping that it could help us with some amount of social interaction, but unfortunately Ava's enthusiasm died very shortly after it started and after I think the fourth meeting or so the group disbanded.

Q. How far into 2008 was that if you recall?

A. That would have been in spring 2008.

Q. When it disbanded?

A. It both commenced and disbanded in spring 2008.

Q. You mentioned during 2008, did you and petitioner enroll the children in any school?

A. We did not.

Q. By the way, do you have any family in Zurich?

A. I have none.

Q. Or Switzerland in general?

A. I have none.

Q. Does your wife?

A. To the best of my knowledge she has none.

Q. When you came to Zurich in 2008, did you maintain bank accounts?

A. We maintained all of our bank accounts.

Q. Could you describe where your bank accounts were?

A. Yes. I have three bank accounts all with Bank of America. I have a savings account, a joint checking account together [262] with my wife, and another additional checking account.

Q. Those accounts are here in the United States?

A. That's correct. They are here in the United States.

Q. Do you have a bank account in Switzerland?

A. I do.

Q. Where is that?

A. With UBS.

Q. Do you maintain all those accounts today?

A. I do.

* * * * * *

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THE COURT: Let me pause on that. The conversations that you and she had after she revealed this romantic relationship were not, were they, the rather calm conversations that upon recounting that we heard here to the Court but we[re] probably much more emotionally charged, yes?

THE WITNESS: Most of them were civil, your Honor, and some were heated.

THE COURT: So anyway fast forward to July 31st. And judging from this letter to your parents, it looks like she was saying in effect I made a terrible mistake, would you consider taking me back, yes?

THE WITNESS: Yes, your Honor. That is my reading of it.

THE COURT: Had she had a similar situation with you?

THE WITNESS: Yes, your Honor.

THE COURT: Now "back" was Switzerland, was it not?

THE WITNESS: Your Honor, I believe back was into the familial relationship.

THE COURT: The familial relationship you, I.H.-B., and L.H.-B. were all in Switzerland at that time?

THE WITNESS: Yes, your Honor.

THE COURT: At that point in time likely to be there for the foreseeable future, yes?

THE WITNESS: Yes, your Honor.

* * * * * *

[284]

[284:16]

Q. During the entire period, February to September, what were you doing with respect to child care?

A. So for the first three months approximately that I was de facto a single father, my mother came over to help with the child care and she would essentially take care of the children while I was at work and I would take care of the children together with her during the rest of the time.

Q. Did you make any adjustments to your schedule as a result?

A. Oh, certainly. I immediately dropped down with my hours at work. I would say starting around then I was working more like [285] 40 and 50 hours a week

between 40 – sorry. I said that wrong. I was working more between 30 and 40 hours a week [than] between the 40 and 50 I had previously been working.

Q. Were [there] decisions to be made for the children during this time period?

A. Many. In particular I was left in the position of making the decisions about medical matters. I was making all decisions about schooling. When I hired an au pair to take care of the children together with me allowing my mother to return to the United States, it was I clearly who selected and hired the au pair.

Q. Did you make any dietary decisions?

A. Yes. The children and I share a vegan diet and this became an issue certainly for example when enrolling the children in school. It was my decision for them to continue this diet.

Q. Did you provide financial support to your wife after she left in February 2009?

A. I provided her with a weekly allowance.

Q. How much was that?

A. It was $100 a week

Q. How did you do that?

A. I put it into our joint checking account.

Q. Is that the Bank of America account?

A. Yes. The Bank of America account. I should perhaps point out that I terminated that once I learned that she had moved in [286] with her lover.

Q. When was that?

A. I believe I terminated that allowance in August.

Q. August of 2009?

A. Yes.

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APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[EXCERPTS OF CROSS-EXAMINATION OF THOMAS HEYDT-BENJAMIN]

Ava Heydt-Benjamin,

Petitioner,

10 Civ. 0881 (JSR)

v.

Thomas Heydt-Benjamin,

Respondent.

New York, N.Y.
March 10, 2010
11:30 a.m.

Before:

HON. JED S. RAKOFF,
District Judge

APPEARANCES

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BY: ALLAN MAYEFSKY
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(212) 805-0300

[342]

[BY MR. SALTZMAN:]

Q. Now, in September of 2009 you mentioned that ETH was happy with you and you signed the contract. Were you happy with ETH?

A. Yes, I was.

Q. You speak German, is that correct?

A. I would say I speak passing German. I wouldn't say that I am fluent.

Q. Did you get along well with your colleagues at ETH?

A. Yes, I did.

Q. Did you maintain relationships with people at IBM after you left IBM?

A. To a certain extent.

Q. Did you have friendships in the community in Switzerland?

A. Yes.

Q. You were a member of a rock climbing club, is that right?

A. Yes.

Q. A member of the gym?

A. No.

Q. You had people with whom you played music in Switzerland?

A. Yes. I had one – two performances, yes, while I was living there.

Q. Is there a particular club music venue that you enjoyed going to frequently while going to Switzerland?

A. Yes.

Q. You continued to go there up until the time you left one of [343] those, correct?

A. That is not right.

Q. This club is called Doc 18?

A. I think it is Doc 19 if I recall correctly.

Q. When is the last time you did go to Doc 19?

A. I don't remember exactly, but I think the last time I went there was when I went together with Ava, which would have been some time in September.

Q. September of 2009?

A. Yes.

Q. You went with Ava to Doc 19?

A. Yes.

Q. This was a social outing just you and she?

A. Yes.

Q. Was that a pleasant evening?

A. Yes.

Q. The lease you signed for the apartment you were most recently residing in Zurich is still in effect, is that correct?

A. That is correct.

* * * * * *

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Q. Shortly after her return she and you acted cooperatively in connection with the children, is that correct?

A. Yes, we did.

Q. Among other things you had a very pleasant day together at the museum upon her arrival?

A. Yes.

Q. You celebrated a birthday party of your younger child L.H.-B. at Ava's house, is that correct?

A. That would have been in September. No, we celebrated L.H.-B.'s birthday party at my place.

Q. Both you and Ava were there for that?

A. Yes.

Q. Now, I am taking you back slightly. After that July 31st e-mail, you testified that you commented to your parents, ["]Let's see what she does,["] more [or] less?

A. Yes.

Q. And another month went by approximately until she did return to Switzerland, is that correct?

A. That is correct.

Q. In the course of that month, you filed divorce papers in the State of New York, correct?

A. I did.

Q. You also terminated her weekly allowance, correct?

A. I believe that is when I terminated her allowance. I am not completely certain. [376]

Q. Yesterday I believe you said August 16. Does that refresh your recollection?

A. I believe at the time I said I wasn't certain of the date and I still feel the same way.

* * * * * *

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE RAKOFF

Ava Heydt-Benjamin,
Petitioner,

v.

Thomas Heydt-Benjamin,
Respondent.

Case No.
10 Civ. 0881

RECEIVED
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U.S.D.C. S.D.N.Y.
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PETITION FOR RETURN OF CHILDREN TO PETITIONER AND FOR IMMEDIATE ISSUANCE OF SHOW CAUSE ORDER TO RESPONDENT

1. This Petition is brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, dated October 25, 1980 (hereinafter the "Hague Convention" or "Convention"), and 42 U.S.C. § 11601 et seq., the International Child Abduction Remedies Act (hereinafter "ICARA"). A copy of the Hague Convention is attached to this Petition as Exhibit A. ICARA is the implementing legislation in the United States for the Hague Convention.

2. Switzerland and the United States are Contracting States of the Hague Convention, which came into effect in Switzerland on January 1, 1984, and in the United States of America on July I, 1988.

3. Article 1 of the Hague Convention provides that the objects of the Convention are: (1) to secure the immediate return of a child wrongfully removed or wrongfully retained in any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to 42 U.S.C. § 11603 (1995) and because this case involves the removal and retention of two children under the age of sixteen from their habitual residence of Switzerland to the United States of America.

5. Respondent is wrongfully retaining the children in the borough of Manhattan, in the City and State of New York.

Background

6. The Petition seeks the return to their habitual residence of the two children of the parties, I.H.-B. and L.H.-B. (the "Children"). The Petitioner mother was born in Connecticut. The Respondent father was born in Pennsylvania. The parties met in Florida in 1999, began to cohabit in Connecticut shortly thereafter, and were married in 2002.

7. Between 1999 and 2007, the parties resided in Connecticut, then in New York, then in Connecticut again, and finally in Massachusetts.

8. The parties' first child, I.H.-B., was born on December 30, 2005, in Massachusetts.

9. In early 2007, the Respondent obtained an internship working for an IBM research laboratory in Zurich. Sometime thereafter, he was admitted to a

doctoral program at the Swiss Federal Institute of Technology, Zurich, Switzerland, as a full time student.

10. Accordingly, in June 2007, the Respondent relocated to Switzerland, with the Petitioner and Children following shortly thereafter on July 4, 2007.

11. The parties' second child, L.H.-B., was born in Zurich, Switzerland, on September 29, 2007.

12. The parties resided together with the Children continuously in Zurich, Switzerland from July 2007 until February 2009, except for two brief periods when the parties visited New York.

13. In February 2009, the parties separated and the Respondent and the Children thereafter remained in the marital apartment in Switzerland until January 2010.

14. At the time that the Respondent abducted the Children to New York in 2010, both parties and the Children were continuing to reside in Switzerland, with the parties living in separate residences.

15. It was the parties' mutual intent to establish Switzerland as their habitual residence.

16. The parties intended to reside in Switzerland, at a minimum, until Respondent obtained his doctorate.

17. The parties fully intended that if Respondent were to successfully obtain acceptable employment in the academic community in Switzerland following his doctorate, they would remain in Switzerland and raise their children there.

18. The parties' son, L.H.-B., has lived his entire life in Switzerland.

19. The parties' daughter, I.H.-B., has lived in Switzerland since she was age one.

20. The parties and the Children became well settled in Switzerland.

21. Both parties enjoyed the weather, the people and the quality of life in Switzerland and became increasingly attached to the country. They believed that it was an excellent place to raise the Children. The parties even discussed applying for citizenship in Switzerland.

22. On or about August 5, 2009, Respondent commenced an action for divorce against the Petitioner in the Supreme Court of the State of New York, Putnam County (the "Putnam County Action").

23. In the verified complaint in the Putnam County Action, the Respondent perjured himself in the very first sentence, stating that, "Plaintiff was and is a resident of Putnam County, State of New York, and has been such resident for a continuous period of at least one year preceding the commencement of this action."

24. In fact, at all times for the year prior to commencing the action, the Respondent had continued to reside at the marital home in Zurich, Switzerland. A copy of the Respondent's complaint in the New York action is attached as Exhibit B to this Petition. A copy of Petitioner's Answer to the Complaint, in which she denies the jurisdictional claims of the Respondent, is attached as Exhibit C.

25. In or about September 2009, Petitioner retained counsel in Switzerland to commence an action in that country against the Respondent for interim custody of the Children. That action is currently pending.

26. On information and belief, in or about January 2010, Respondent consulted with counsel in Zurich who informed Respondent that under Swiss law Petitioner would likely receive custody of the Children in Switzerland.

Circumstances of the Abduction

27. On or about Tuesday, January 26, 2010, the Respondent, without notifying the Petitioner of his intentions, and without her knowledge or consent, secretly took the Children to the international airport in Zurich and boarded a flight with the Children to New York.

28. Unable to find her Children and having no knowledge of their whereabouts, the Petitioner contacted the Swiss police, the Respondent's employer in Zurich, the au pair (who is now with the Respondent in New York), the day care center, and the paternal grandparents, and only then did she learn that the Respondent had taken the Children to New York.

29. The Petitioner immediately demanded that the Respondent return to Switzerland with the Children. The Respondent has failed and refused to do so.

30. Instead, on or about January 28, 2010, the Respondent filed an application for an emergency order to show cause in the Putnam County Action, asking the court to award him temporary custody of the Children. That order to show cause was signed on

February 1, 2010, and is annexed at Exhibit D. Respondent's affidavit submitted in support of the order to show cause, dated January 28, 2010, sets forth that Respondent is now residing at his parents' home, 23 Horton Hollow Road, Putnam Valley, New York. The affidavit is annexed at Exhibit E. However, the Respondent has also spent time residing at his parents' apartment at 530 East 86th Street, Apt. 3C, New York, New York, 10028.

31. Since removing the Children, the Respondent has wrongfully retained them in the United States of America. During this time, the Petitioner has had only minimal telephone contact with the Children, as controlled and limited by the Respondent.

International Child Abduction

32. Article 296 of the Swiss Civil Code provides that each of a child's parents has equal rights of custody. Article 301 of the Swiss Civil Code entrusts both parents with the welfare, care and education of their children and provides that both parents must affirmatively consent to their child leaving the parental home. The Respondent's removal of the Children is therefore in violation of the Swiss Civil Code and is a wrongful removal and wrongful retention within the meaning of Articles 3 and 5 of the Convention.

33. At all times the Petitioner has had "rights of custody" with respect to the Children within the meaning of Article 3 of the Hague Convention.

34. At all relevant times prior to the wrongful conduct of the Respondent, the Petitioner was actually exercising custody over the Children within the meaning of Articles 3 and 5 of the Hague Convention.

35. At the time of the wrongful taking and retention, the Children's habitual residence was Switzerland. Apart from a few weeks at their grandparents' home in New York City in 2007 and 2008, L.H.-B. had spent his entire life in Switzerland, and I.H.-B. since age one.

36. Upon learning of the wrongful taking and retention by the Respondent, the Petitioner immediately and repeatedly demanded the Children's return. She had already filed a petition in the appropriate jurisdiction, Switzerland, for custody of the Children.

37. The Respondent has unequivocally refused to return the Children to their habitual residence in Switzerland.

38. The Petitioner has never consented to or acquiesced in the Respondent's wrongful removal of the Children.

39. Accordingly, the Respondent has abducted and wrongfully taken the Children from the custody of the Petitioner and has wrongfully retained the Children away from their habitual residence in Switzerland in breach of Article 3 of the Hague Convention.

40. On or about February 3, 2010 Petitioner filed an "Application for the Return of a Child" with the U.S. Department of State's designated Central Authority, the Office of Children's Issues, in Washington, D.C., in accordance with the Hague Convention. A copy of the application is annexed at Exhibit F.

41. Pursuant to Articles 2, 11 and 12 of the Hague Convention and *Zajaczkowski* v. *Zajaczkowska*, 932 F. Supp. 128 (D. Md. 1996) and its progeny, proceedings

in Hague Convention cases are to be expeditious and summary in nature, so as to be concluded, if at all possible, within six weeks.

42. Also pursuant to *Zajaczkowski*, *id.*, and its progeny, the rules of procedure applicable to ordinary civil case are at odds with the Hague Convention and ICARA's premium on expedited decision-making.

43. Article 26 of the Hague Convention and 42 U.S.C. 11607(b)(3) provide for the responding party to pay the fees and costs of the petitioning party if an order for the return of a child is entered. 42 U.S.C. 11607(b)(3) provides:

> Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

INTERIM ORDER

44. Petitioner requests that the Court issue a show cause order and direct that the order be served immediately by United States Marshals or by a private process server on Respondent and that he be brought before this Court with the Children forthwith. If Respondent cannot be promptly found Petitioner requests that the order be served on the attorney for the Respondent in the Putnam County Action with a copy delivered to the doorman at 530 East 86th Street, Apt. 3C, New York, New York, 10028, where

Respondent's parents live, and another copy delivered to 23 Horton Hollow Road, Putnam Valley, New York, the Respondent's parents' country home.

WHEREFORE, Petitioner respectfully requests that this Court grant the following relief:

A. Issue an immediate order (i) prohibiting the removal of the Children from the jurisdiction of this Court; (ii) directing the Respondent to bring the Children to this Court and deliver to the Court the Respondent's and the Children's passports and all other travel documents; (iii) directing that this order be enforced by any United States Marshal, federal officer or police officer; (iv) directing that the name of the Children be entered into the national police computer system (N.C.LC.) missing person section; and (v) requiring the Respondent to allow and facilitate daily 20 minute telephone calls between the Petitioner and the Children, which calls must not be recorded or monitored.

B. Promptly schedule an initial hearing or pre-trial conference for the purpose of establishing an accelerated scheduling order shortening ordinary procedural civil litigation time so as to reach a final determination on the Petition within six weeks of filing.

C. Issue a final order following the hearing, directing the Respondent to (a) return the Children, forthwith, to their habitual residence in Switzerland and (b) pay all of Petitioner's costs, attorneys fees and expenses.

D. Grant such other and further relief to Petitioner as justice may require.

VERIFICATION

I, Ava Heydt-Benjamin, solemnly declare and affirm under the penalties of perjury and the laws of the United States of America, that the contents of the foregoing Petition are true to the best of my knowledge, information and belief.

Dated: 02-03-2010

/s/ Ava Heydt-Benjamin
Ava Heydt-Benjamin

LAW OFFICE OF JEREMY D. MORLEY
By:

_____
Jeremy D. Morley (JM 4492)

and

/s/ Bradley H. Andrews
Bradley H. Andrews (BA 9876)

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APPENDIX I

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

CHAPTER 1 – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For

this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a)* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

* * * * * *

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

* * * * * *

APPENDIX J

Title 42 U.S.C. § 11601
International Child Abduction Remedies Act

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes–

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

APPENDIX K

Title 42 U.S.C. § 11603

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (A) of this section shall establish by a preponderance of the evidence–

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing–

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter–

(1) the term "authorities," as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained," as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings," as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the

filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

APPENDIX L

---------Forwarded message ---------

From: Roger Groner roger.groner@gronerlaw.ch

Date: Tue, Jan 19, 2010 at 6:59 AM

Subject: Re: I hereby provide the contact information for my legal advisors

To: Tom Heydt-Benjamin tshb@acm.org

Cc: Ava Heydt-Benjamin ava.heydtbenjamin@gmail.com, "Margaret A. Clark" maclaw8@mac.com

Dear Mr. Heidt-Benjamin [sic]

Please allow me to summarize our telephone conversation:

1) It is possible for your wife to file a motion for interim relief ("Eheschutz", the proceeding to regulate the separation period, not the divorce) so that she will receive support/alimony and will get factual custody during the separation; based on two reasons:

You, Mr. Heidt-Benjamin, might be considered to be domiciled in Switzerland; and also your wife. Under Swiss law, either the plaintiff or the defendant needs to have a domicile so that he/she can ask for a Eheschutz-proceeding. This means that even if you transfer your domicile to NY/USA, your wife would have jurisdiction in Switzerland (based on her alleged domicile here).

2) Even though you have the children now for almost a year, your wife has good chances, under Swiss law, to get the custody over the children (bc she does not work and has plenty of time to take care of the children).

Kind regards, Roger Groner

No. 10-1303

IN THE

SUPREME COURT OF THE UNITED STATES

AVA HEYDT-BENJAMIN,

PETITIONER,

V.

THOMAS HEYDT-BENJAMIN

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it is proper for a court to consider a factual finding that the American parents of very young children -- aged one and three for much of the time at issue -- intended that those children, also American citizens, return to the United States following their father's temporary work-study appointment abroad in determining that those children's "habitual residence" under the Hague Convention was the United States, when all or all but one of the Circuits to have considered the issue have held that such intent is relevant to that determination.

2. Whether it is proper for a court to consider a factual finding that two very young American children were not "acclimatized" to Switzerland in determining that their "habitual residence" is the United States, given that the children's connection to the forum was minimal, neither of the parents or their families reside in Switzerland, or have any continuing connection to that country, and that the parent seeking removal has no demonstrated ability to return to Switzerland.

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STATEMENT OF THE CASE

This case presents an entirely unremarkable question under the Hague Convention on the Civil Aspects of International Child Abduction, dated October 25, 1980 and 42 U.S.C §11601 *et seq.*, the International Child Abduction Remedies Act ("ICARA") (the "Hague Convention" or "Convention"): Can the "habitual residence" of two very young children (one and three for most of the time at issue) who lived abroad temporarily with their American parents during their father's graduate studies be determined with reference to the shared intent of the parents that the children would return to the United States. Virtually all of the Circuits have answered in the affirmative and have held that such parental intent is relevant, if not dispositive, because very young children are not generally capable of deciding their own residence or becoming meaningfully acclimatized to a foreign forum. The Sixth Circuit is the only Circuit to have suggested that parental intent is not a relevant factor, and it did so in a case very different from the one at bar (not least because it involved one parent who was a citizen of the foreign forum). That decision has been criticized by numerous other courts, and indeed in a subsequent decision, the Sixth Circuit has recognized that parental intent may be a relevant factor and a district court in that Circuit has so held. Thus, petitioner's claim that the Circuits are "intractably" split simply does not bear scrutiny. Not surprisingly,

many foreign jurisdictions that have considered the relevance of parental intent to the habitual residence determination have also reached decisions consistent with the Second Circuit's decision here.

Nor would this case be a good vehicle for certiorari even were there an outcome-determinative split among the Circuits (which there simply is not). Here, neither of the parents has any intent, desire or indeed ability to return to Switzerland or leave the United States. Apart from the federal action challenged here, the parties have been involved in a separate divorce proceeding since 2009 in New York State, the jurisdiction of which was recently affirmed by the New York Appellate Division on distinct grounds not at issue in this Petition. There is simply no reason to consider the almost hypothetical question of whether Switzerland could possibly determine the custody of these children - children who have at all times, at consent of Petitioner and pursuant to court order, remained in the custody of Respondent.[1]

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[1] We are in receipt of the motion and brief of Professors Linda D. Elrod and Robert G. Spector in support of the Petition and asking the Court to resolve the perceived conflict among the circuits. As discussed, *infra*, at 11-20, we submit that the degree of "conflict" among the circuits on the issue of parental intent is not meaningful, particularly as applied to the facts of this case, *amici's* elaborate hypotheticals notwithstanding, there is nothing presented on the facts here that would lead to a different outcome in any jurisdiction.

A brief recitation of the facts is necessary to correct several misperceptions created by Petitioner's brief.

Petitioner, Ava Heydt-Benjamin, and Respondent, Thomas Heydt-Benjamin, are both American citizens who were raised, educated and married in the United States. (C.A. App. 65-66, C.A. App.127-128, Pet. 9a-Pet. 10a.)[2]. They have two children: I H-B, born December 30, 2005, and L H-B, born September 28, 2007 (C.A. App.132, C.A. App.66-67, Pet. 11a), both of whom are also American citizens (C.A. App. 66, C.A. App.132, Pet. 10a) (the "Children"). Neither the parents nor the Children have Swiss citizenship.

After graduating from Yale and spending a few years teaching high school in New York, Respondent attended the University of Massachusetts where, in 2007, he received his Masters Degree. While at the University of Massachusetts, Respondent was accepted to a three-month internship program at IBM in Zurich, Switzerland (C.A. App. 130, Pet. 11a). Petitioner, who was pregnant at the time with the couple's second child, was reluctant to travel to Switzerland, yet agreed to follow Respondent, along with I H-B (C.A. App. 66, C.A. App. 259). The parties agreed that their stay in Switzerland would last three months, following which they would return to the

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[2] References thus "C.A. App._" are to the Appendix filed with the Second Circuit and "Pet. __" are to Petitioner's Appendix to the Petition

United States (C.A. App. 67, C.A. App. 130, C.A. App. 131, Pet. 19a). The parties put much of their furniture in storage (C.A. App. 130, Pet. 20a. When they arrived in Switzerland, Petitioner entered the country on a tourist visa (C.A. App. 67, C.A. App. 132). L H-B was born during this brief stay in Switzerland (Pet. 11a).

While in Switzerland, Respondent was accepted to a three-year pre-doctoral program sponsored by IBM, to begin in 2008 in Zurich (C.A. App. 68, C.A. App. 133, Pet. 11a). The parties agreed to return to the United States as soon as possible after the conclusion of Respondent's program (C.A. App. 133). Prior to commencing the program, in November 2007, the family returned to the United States, to the home of Respondent's parents in New York, where they remained for the duration of the year (C.A. App. 132, Pet. 11a).

In January 2008, the parties and the Children returned to Switzerland for what was to be a three-year temporary stay (C.A. App. 264, C.A. App. 69, Pet. 11a). This time Petitioner and the Children held one-year renewable temporary residency permits (C.A. App. 134, C.A. App. 318).

In early July 2008, Petitioner and the Children again returned to the home of Respondent's parents in New York, where Respondent then joined them and the family remained through the end of August 2008 (C.A. App. 80, C.A. App. 136, C.A. App. 304, Pet. 12a).

Soon after the family returned to Switzerland in September (C.A. App. 138), Petitioner told Respondent of her intention to return to New York for a couple of months with the Children so that she could enroll in an art internship (C.A. App.138, C.A. App.·81). Petitioner intended once again that the Children would reside with Respondent's parents at their home in New York (C.A. App. 138). Respondent consented to the trip and purchased round·trip airline tickets for Petitioner and the Children, to be used in March 2009 (C.A. App. 138 · 139).

Soon after making these plans, however, Petitioner changed her stated intentions regarding the trip. She told Respondent that her plans were more "open ended" and that her stay in the United States would extend for several more months, into the summer of 2009 (C.A. App. 253). She declared her intention to leave the Children with Respondent's mother in New York while she traveled in the United States (C.A. App. 305, Pet. 20a).

Contrary to what she now contends in her Petition, Petitioner did not leave Switzerland in 2009 "to work temporarily in the United States." Petition, p. 4. Rather, as she disclosed to Respondent, Petitioner was involved in an online relationship with a former boyfriend of hers (C.A. App. 139), with whom she intended to meet up when she returned to the United States. Learning this, Respondent objected and withdrew his consent to the Children's participation in this trip (C.A. App. 141).

Petitioner then decided to leave the Children behind with respondent and nevertheless returned to the United States in February 2009, making Respondent the *de facto* custodial parent (C.A. App. 276, Pet. 20a). When she left, Petitioner took essentially all her belongings leaving very little in Switzerland (C.A. App. 143). She did, however, leave her wedding rings. (C.A. App. 143).

After arriving in the United States, Petitioner learned that the art installation project for which she purportedly returned to the United States had been canceled (C.A. App. 275). Nevertheless, she remained in the United States for the next seven months (C.A. App. 276, Pet. 12a). She did not contact the Children for approximately four months (C.A. App. 274, C.A. App. 148).

In August 2009, while Petitioner was living in the United States, Respondent commenced an action for divorce in New York Supreme Court, Putnam County, seeking, *inter alia*, custody of the Children (the "Matrimonial Action") (C.A. App. 149 –-150, Pet. 12a).

Petitioner then flew back to Switzerland in September, 2009 (C.A. App. 85, Pet. 12a), where she sublet a room in an apartment (C.A. App. 315, Pet. 12a). Respondent continued to have primary custodial responsibility for the Children (C.A. App. 315, Pet. 12a).

A month after returning to Switzerland, Petitioner announced that she had an "opportunity" to earn some money farm-sitting in California. As

before, she asked to bring the Children back with her to the United States (C.A. App. 315). Respondent, again, did not consent to the Children's involvement in this trip (C.A. App. 315). Again, Petitioner left the Children in Respondent's care and traveled to Texas, where her boyfriend resided, and later to California where, in November 2009, she was served with process in the New York Matrimonial Action (C.A. App. 315, Pet. 12a). Petitioner remained in the United States until December 2009 (Pet 12a), making her absent from Switzerland (and away from the Children) for a total of nine months in 2009.

After returning to Switzerland in December 2009, Petitioner saw the Children for four overnight visits and on a few other daytime visits (C.A. App. 318, Pet. 12a).

In December 2009, Petitioner appeared in the New York Matrimonial Action by interposing an answer and counterclaim in which she sought, *inter alia*, custody of the Children (C.A. App.15 –21).

On January 25, 2010, after his and the Children's temporary residency permits had expired, Respondent and the Children returned to New York, to the home of Respondent's parents (C.A. App. 318 - 319). Upon his return to New York, Respondent informed Petitioner of his whereabouts and offered to purchase her an airline ticket to come back to New York. Petitioner refused the offer, again ceding *de facto* custody of the Children to Respondent.

On January 28, 2011, Respondent filed an order to show cause in the New York Supreme Court

seeking, *inter alia*, temporary custody of the Children (Pet 10a). Respondent was granted an *ex parte* order of interim custody. On February 17, 2010, Petitioner's counsel consented, on the record, to an extension of the order of temporary custody to Respondent, and such was ordered by the court. Transcript of the N.Y. Sup. Ct., County of Putnam, *Heydt-Benjamin v. Heydt-Benjamin*, Index No. 002318/2009 (February 17, 2010)[3]

On February 4, 2010, Petitioner filed a petition in the Southern District of New York for the return of the Children to Petitioner pursuant to the Hague Convention (the "Hague Petition"). Petitioner also moved, by order to show cause, for an order staying the proceedings in the Matrimonial Action.

The district court (Rakoff, J.) scheduled a hearing on the Hague Petition and reserved ruling on Petitioner's stay motion. Following a four-day hearing, on March 15, 2010, the court issued a detailed decision from the bench, dismissing the Hague Petition on the ground that Petitioner had not

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[3] "The Court: Mr. Vanderwoude, you consent that Plaintiff herein Thomas Heydt-Benjamin will continue to have exclusive temporary, sole legal custody of I H-B...and L H-B...Do you consent? Mr. Vanderwoude: Yes."
Petitioner subsequently challenged jurisdiction of the New York Court. Following the decision in this proceeding dismissing petitioner's Hague petition, the New York State Court found that custody jurisdiction was proper in that court and that finding was recently affirmed on appeal. *Heydt-Benjamin v. Heydt-Benjamin, 2010-06133, slip op. 04420 (N.Y. App Div. 2d Dep't May 24, 2011).*

met her burden to establish that the Children's habitual residence was in Switzerland. To the contrary, the court found unequivocally that the Children's habitual residence was the United States. The court also denied Petitioner's motion for a stay of the Matrimonial Action.

In making its determination, the district court properly applied the standard by the Second Circuit in *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005), and found that (i) the parties' last shared intent was to reside only temporarily in Switzerland and return with the Children to the United States, and (ii) these very young Children had not become so acclimatized to Switzerland as to countermand the last shared intent of the parents.

Indeed, the court found that it came through "loud and clear from the evidence" that Petitioner "saw not only her future but also [the Children's] as being in the United States." (Pet. 21a) The court further found "without any difficulty at all that the Petitioner never intended at any time relevant to this Court's determination to have Switzerland be her children's place of habitual residence." (Pet. 23a)

The Petition's claim that the court found no mutual intent to remain in Switzerland "because Petitioner had apparently expressed some dissatisfaction with the move" (Petition, p. 6) grossly misstates the facts as presented at trial and the district court's factual finding. In abandoning her two toddler-aged children for nine months in order to reside in the United States, Petitioner evidenced

much more than "some dissatisfaction" with the move, but rather her absolute unwillingness to remain in Switzerland and her unwavering desire to reside in the United States. Moreover, on both occasions when she returned to the United States, she expressed her wish to bring the Children with her, further demonstrating her desire to have the Children reside in the United States.

Contrary to the allegations in the petition to this Court, the district court specifically found the Children, who had just turned two and four years old when they returned to the United States, were not so acclimatized as to overcome the import of the parents' last shared intent. Given Respondent's role as primary caregiver and the Children's close attachment (both personal and financial) to their grandparents in New York, as contrasted with the family's complete lack of any ties to Switzerland, it would be contrary to the principles of the Convention, the interests of the Children, and common sense to find that the fleeting contact these Children had with Switzerland should override the clear attachment of the nuclear family to the United States, and the district court so found.[4]

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[4] Contrary to the Petition (Petition, p. 19, FN 9), the other Hague factors were and are still in dispute. However, since petitioner failed to meet her initial burden of establishing Switzerland as the Children's habitual residence, there was no need for the court to inquire further. It is not clear Petitioner had a right of custody that she was exercising, given her abandonment of the Children for such an extended period and her minimal contacts with them following her return.

Petitioner appealed to the Court of Appeals for the Second Circuit and the district court's decision was affirmed by Summary Order. Petitioner thereafter petitioned for rehearing, en banc. Her petition was denied.

REASONS FOR DENYING THE PETITION

A. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS THAT WOULD AFFECT THE RESULT IN THIS CASE

1. The Balanced Approach of the Second Circuit

The threshold question in any case brought under the Hague Convention is the child's "habitual residence." This inquiry is premised on the notion that the country in which a child is habitually resident is in the best position to determine issues of custody and access. *Croll v. Croll*, 229 F.3d 133, 137 (2d Cir. 2000). The Hague Convention does not define the phrase "habitual residence."

The standard in the Second Circuit for determining habitual residence under the Hague Convention was first articulated in *Gitter*. *See also, Poliero v. Centenaro,* 373 Fed. Appx. 102 (2d Cir. 2010); *Halaf v. Halaf,* 372 Fed. Appx. 176 (2d Cir. 2010), as well as the opinion below in the case at bar. Under *Gitter*, to determine a child's habitual residence, the court should first "inquire into the shared intent of those entitled to fix the child's

residence (usually the parents)," and, second, to "inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence." 396 F.3d at 134

In reaching the appropriate standard for habitual residence, the Second Circuit was "[i]nformed . . . by the opinions of sister Circuits that have already considered the issue" and "also mindful that the Supreme Court has instructed the lower courts that when interpreting international conventions and treaties the opinions of our sister signatories [are] entitled to considerable weight." *Id.* at 131. After analyzing the relevant precedents, the Second Circuit recognized the "importance of intentions (normally the shared intentions of the parents or others entitled to fix the child's residence) in determining the child's habitual residence." *Id.*

Parental intent makes particular sense as a guiding principle since, as the Second Circuit noted, the Hague Convention provision at issue here does not apply to children over sixteen and, even as to children under sixteen, a court may ignore habitual residence and defer to the view of a child who "has attained an age and degree of maturity at which it is appropriate to take account of its views." *Id.* at 132 (n.7 citing Hague Convention arts. 4, 12, &13). Nor can one argue, as Petitioner implies, that the courts are incapable of or unreliable in determining intent because it may raise issues of credibility. This is, of course, the day-to-day business of the courts.

In addition, the Second Circuit agreed with the Ninth Circuit's recognition in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (Kozinski, J.), that simply looking to the child's location is flawed because it is unclear what the relevant time frame should be in which to conduct the inquiry. "A child who spends two months at Camp Chippewah, if observed only during that period, would appear to be habitually resident there. On the other hand, if we follow the same child through to adulthood, we might label a couple of years spent studying abroad a mere temporary absence of long duration. This indeterminacy is unavoidable..." *Mozes*, 239 F.3d at 1074 (internal quotations omitted). Nevertheless, the Second Circuit further recognized, consistent with its sister Circuits, that "analysis of the evidence of acclimatization" of the child to the new location should also factor into the inquiry. *Gitter*, 396 F.3d at 134.

2. The Second Circuit's Consideration of Intent is Consistent with Virtually All Other Circuits

Not surprisingly, given the sound analysis underlying the standard, the Second Circuit approach, which balances parental intent and the attachment of a child to a particular location is consistent with the approach of all the other Circuits, with the possible exception of the Sixth Circuit (which, as discussed below, is evolving toward the

more balanced approach shared by the other Circuits).

Although the various Circuits articulate the proper inquiry differently, all of them (save the Sixth which is discussed below) consider parental intent to be an important factor in determining the habitual residence of very young children. Six Circuits consider parental intent the dominant factor in determining habitual residence in all cases, although that intent can (as in the Second Circuit) be overcome by a showing of other relevant factors. *Nicolson v. Pappalardo,* 605 F.3d 100, 103-104 (1st Cir. 2010) ("The Hague Convention does not define 'habitual residence,' but the majority of federal circuits to consider it have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence"); *Gitter,* 396 F.3d at 134 (finding that to determine a child's habitual residence, the court should first "inquire into the shared intent of those entitled to fix the child's residence (usually the parents)," and, second, "inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence); *Maxwell v. Maxwell,* 588 F.3d 245, 251 (4th Cir. 2009) ("Federal courts have developed a two-part framework to assist in the habitual residence analysis. Under this framework, the first question is whether the parents shared a settled intention to abandon the former country of residence." (citing *Mozes*)); *Koch v. Koch,* 450 F.3d

703, 715 (7th Cir. 2006) (court finds "no reason to disavow the *Mozes* approach," which "asks the court to determine first whether the parents shared an intent to abandon the prior habitual residence..."); *Mozes v. Mozes*, 239 F.3d 1067, 1078 (9th Cir. 2001) ("the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind"); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004) ("the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." (adopting *Mozes* standard)).

Three Circuits recognize the importance of parental intent among several factors. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995). ("[A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010) ("The 'settled purpose' of a family's move to a new country is a central element of the habitual residence inquiry.'...Additionally, the settled purpose must be from the child's perspective, although parental intent is also taken into account." (citing *Feder*); *Kanth v. Kanth*, 2000 U.S. App. LEXIS 27383, *1, 3-4 (10th Cir. 2000) ("Although it is the child's habitual residence that the court must determine, in the case of a young child the conduct, intentions, and agreements of the parents during the

time preceding the abduction are important factors to be considered.")[5]

Finally, although the Fifth Circuit has not fixed a separate standard for determining habitual residence, at least one district court within the Circuit has followed the standard above. *Clausier v. Mueller*, No. 4:03-CV-1467-A, 2004 LEXIS 10367, *3 (N.D. Tex. Apr. 27, 2004) ("The conduct, intentions, and agreements of the parents during the time period preceding the retention are important factors to be considered, particularly where young children are involved.") Several state courts have also expressly adopted the Second Circuit's standard. *See In re S.J.O.B.G.*, 292 S.W.3d 764 (Tex. App. 2009); *In re J.G.*, 301 S.W. 3d 376, 381 (Tex. App. 2009) ("We conclude this two-pronged standard [adopted in *Gitter*] gives proper weight to the various interests of the parties").

Other state courts have likewise acknowledged the importance of parental intent in determining habitual residence. *See Courdin v. Courdin, 2010* Ark. App. 314 (2010) (court applying standard adopted in *Mozes* in determining habitual residence); *In re Marriage of Forrest & Eaddy*, 51 Cal. Rptr. 3d 172, 179-180 (2006) ("Most frequently, the analysis of [the issue of habitual residence] begins with an examination of the intent of the person or persons entitled to determine where the child lives" (citing *Mozes*); *Ciotola v. Fiocca*, 86 Ohio Misc. 2d 24, 30 (Ohio Ct. Com. Pl. 1997) (finding that

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[5] The D.C. Circuit has not reached the issue.

in cases where the children are of "tender years," a court should consider the "'overtly stated intentions and agreements of the parents' during the period *preceding* the wrongful abduction or retention." citing *Feder*).[6]

Under the circumstances of this case, given the young ages of the Children who, as the district court found, were not acclimatized, the temporary nature of the stay in Switzerland, the lack of any ties to Switzerland by their parents (both American citizens only) and their minimal ties to Switzerland, the factor of parental intent would have dictated the same result as reached by the Second Circuit here in each of the other Circuits.

The Sixth Circuit, then, is the only federal jurisdiction that requires closer scrutiny. However, here too it is not apparent that the result in the case at bar would have been any different in that jurisdiction.

The Sixth Circuit jurisprudence on habitual residence began with the 1993 case of *Friedrich v. Friedrich,* 983 F.2d 1396 (6th Cir. 1993). In that case, the Sixth Circuit stated that to determine

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[6] Petitioner also relies on the nearly ten-year-old case of *Vaile v. Eighth Judicial District Court,* 44 P.3d 506 (Nev. 2002), which, in light of intervening decisions in other jurisdictions, is certainly an outlier to the extent it was ever persuasive. Further, the children there were older (the eldest daughter was nine and attended school in Norway) and, unlike here, were registered under Norwegian law as residents of that country, giving them the "degree of settled purpose" that the Children here lacked.

habitual residence, "the court must focus on the child, not the parents, and examine past experience, not future intentions." 983 F.2d at 1401. *Friedrich* was the first case that set a standard for determining habitual residence, and, as has been noted in several subsequent cases, was a "simple case" (*see, e.g., Robert v. Tesson*, 507 F.3d 981, 989 (6th Cir. 2007); *Jenkins v. Jenkins*, 569 F.3d 549, 560 (6th Cir. 2008)) in which the facts would have led any court, using any standard, to reach the same outcome.

In *Friedrich*, the parents were of different citizenships. Mr. Friedrich was a German citizen, resided in Germany, worked in Germany, and was married in Germany. The couple's two-year-old child, who was born in Germany and held dual citizenship, had only been to the United States on one ten-day trip. Although Mrs. Friedrich had testified as to *her* intent to return to the United States when she was discharged from the military, there was no evidence that Mr. Friedrich ever intended to leave Germany. Thus, even under the *Gitter* standard, given the absence of any demonstrated *shared* intent, Mrs. Friedrich would not have sustained her burden to prove that the child's habitual residence was in the United States.

Friedrich's inflexible standard has been criticized by the other circuits,[7] and courts within the

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[7] See, *Mozes*, 239 F 3d at 1080: "The facts of *Friedrich* thus provided no legitimate occasion for a broad pronouncement that parental intent is irrelevant to the question of habitual residence."

Sixth Circuit have steadily chipped away at its apparently rigid holding and have questioned the appropriateness of any standard that completely disregards parental intent. For example, in *Maynard v. Maynard*, 484 F. Supp. 2d 654 (E.D. Mich. 2007), the court, in ruling that the children's habitual residence was not the United States, made specific reference to the temporary nature of the family's residence in the United States, thereby bringing the parties' intentions into consideration. The court further noted that "from the day the children were born, it was clearly the intent of the parties that their stay in the United States would end when Mr. Maynard's five-year employment contract expired." *Id.* at 660 n.9.

The Sixth Circuit itself acknowledged that in cases involving very young children like those here, who "may lack the cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose," an investigation into the "subjective intentions" of such child's parents could potentially be considered, although the court did not reach the question. *Robert v. Tesson*, 507 F.3d 981.

Recently, in *McKie v. Jude*, No. 10-103-DLB, 2011 U.S. Dist. LEXIS 1834 (E.D. Ky. Jan 7, 2011), the court, citing *Robert v. Tesson*, questioned what it termed the "one-dimensional approach applied in *Friedrich*" and considered parental intent, reasoning:

> Parental intent is important because it provides context for the objective contacts a child has in a given country and should inform the habitual residence analysis when a child lacks the mental capacity to shape that context him or herself. *McKie,* 2011 U.S. Dist. LEXIS 1834 at *32.

Thus, it appears that to the extent the Sixth Circuit approach, at least as broadly articulated, may be seen as inconsistent with its sister Circuits, the actual jurisprudence has been shifting to more closely match the dominant view.

The approach Petitioner proposes is unmoored from both the existing law in any jurisdiction and the record in this case. It is indisputable that the question of a child's habitual residence, and indeed all issues surrounding child custody determinations, are fact specific inquiries that cannot be reduced to a single simplistic rule. *See Karkkainen v. Kovalchuk,* 445 F.3d 280, 291 (3d Cir. 2006), citing *Whiting v. Krassner,* 391 F.3d 540, 546 (3d Cir. 2004). Petitioner would have it that the court look only to where the children were during a very discrete portion of time. This is because the examination of any other factors leads to the ineluctable conclusion that these children belong in the United States.

It makes little sense to look only at the location of the Children while Petitioner, herself, was in the United States with the intent to reside there

permanently. The Children, having just turned two and four at the time of their return to the United States, did not have the capacity to select their own habitual residence.

Petitioner's approach would result in the return of the Children to a country where neither party lives (or had any expectation of living), works, has family, or has any current connection. Their removal from the parent to whom Petitioner concededly ceded primary care when she abandoned them to return to the United States in 2009, is an outcome clearly contrary to the letter and spirit of the Hague Convention. The only link to Switzerland either party ever had was through Respondent's work/study program – a temporary situation by design which was to terminate upon Respondent attaining his Ph.D. Petitioner, an American citizen, has never demonstrated an independent ability to reside in Switzerland with children who are also American citizens only. Petitioner's proposed standard also disregards her own conduct in rejecting Switzerland as her, and the Children's, habitual residence. As the district court commented in its bench decision, "[t]here is therefore an irony, that would be humorous were the stakes not so serious, in Petitioner now taking the position that Switzerland is her children's habitual residence as well as her own." (Pet. 18a)

3. Contrary to the Assertions in the Petition, as the District Court Found and the Second

Circuit Affirmed, the Children Here Were Not Acclimatized to Switzerland.

Recognizing that the Children "had not even reached the stage where their interactions with peers and things like years of schooling, close relationships with other school children, language considerations and many other factors could fairly warrant a finding that they had somehow become more Swiss than American," (Pet. 25a) the district court found that despite their time in Switzerland, their habitual residence "unquestionably" remained in the United States.

In examining acclimatization, courts look to whether a child "has become 'firmly rooted' in her new surroundings, not merely whether she acculturated to a country's language or customs." *Karkkainen v. Kovalchuk*, 445 F.3d 280, 292, citing *Holder v. Holder*, 392 F.3d 1009, 1019 (9th Cir. 2004). Academic activities have been held to be one of the most central to a child from his or her perspective. *Feder*, 63 F.3d at 224. Here, the Children had just turned two and four when they returned to the United States, and were only one and three during the majority of their time in Switzerland. Neither was enrolled in any academic activities, although they attended daycare for a short while (Pet. 20a, Pet. 22a). Given the Children's very young ages and their limited abilities to interact with other children, there could be no longstanding "friends" in Switzerland and, as referred to above,

they had no other family there. Their excursions to the park and museums, which at their ages they could little comprehend or remember, provide no basis for a finding that these Children had become so "firmly rooted" in Switzerland as to override the intentions of their parents. One may be "'acclimatized' in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's habitual residence." *Mozes*, 239 F.3d at 1079.

Acclimatization involves more than just physical presence in a particular place. Parental intent, especially in cases involving such young children as these, must be considered in determining whether they have become acclimatized. As the Third Circuit has observed:

> Though we examine acclimatization and settled purpose "from the child's perspective," *Feder*, 63 F.3d at 224, we consider parental intent as part of this inquiry "because the child's knowledge of these intentions is likely to color its attitude to the contacts it is making," *Mozes*, 239 F.3d at 1079-80. *See also, Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) (noting that, although courts must focus on the child, "parental intent is also taken into account"). As the Court of Appeals for the Ninth Circuit noted, the intentions

> of a child's parents may affect the length of time necessary for a child to become habitually resident or otherwise influence a child's ability to acclimatize. *Mozes*, 239 F.3d at 1079-80.

Karkkainen, 445 F.3d at 292.

Here, while Respondent and the Children were in Switzerland, Petitioner was residing in the United States for the better part of 2009. There could not have been a "settled purpose" to remain in Switzerland from the Children's perspective when their mother was residing in the United States. Nor could it be argued that the Children abandoned the United States as their habitual residence when their mother continued to reside here and their father, as the district court found, also intended to return to the United States at the conclusion of his studies.

B. DECISIONS IN FOREIGN JURISDICTIONS DO NOT MILITATE IN FAVOR OF GRANTING THE PETITION

In addition to being consistent with the other Circuit Courts of Appeal, the Second Circuit standard for the determination of habitual residence is consistent with, and indeed cited by, courts in other countries. Parental intent is generally deemed an important factor in determining residence. Thus, for example, in *S.C. v. L.W.H.*, 2010 N.B.J No. 257 (Can. N.B. Q.B.)(LEXIS), the

Canadian court considered the intent of the child's parents, finding that although the parties had moved to Ireland, the child's habitual residence was in Canada given the lack of any shared intent of the parents to make Ireland their home. Significantly, in reviewing the applicable standards for determining habitual residence, the court looked to the Second Circuit's decision in *Gitter* and the Third Circuit's decision in *Whiting*. The court perceived no conflict between these circuits and instead correctly noted the consistent finding of these courts that "in determining the habitual residence of the child, the court must consider the intent of the child's parents..." *Id. at *17.*

Courts of other countries have also consistently looked to the intent of the parents, especially in cases as here involving young children, in determining habitual residence under the Hague Convention. Many of the foreign country cases cited by Petitioner acknowledge that, consistent with the Second Circuit, parental intent is a factor in determining habitual residence. *Cameron v. Cameron, [1995] CSIH 17; (1996) S.C. *1, 3 (Scot.)* ("A person can, we think, have only one habitual residence at any one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents"); *L.K. v. Director-General, (2009) 237 CLR 582, *8 (Austl.)* ("[E]xamination of a person's intentions will usually be relevant to a consideration of where that person habitually resides"). Additional cases in

foreign jurisdictions further reinforce this approach. *In re Bates, (1989), CA 122/89 (High Ct. of Justice, Family Div. Ct., Royal Cts. of Justice)* ("Overtly stated intentions and agreements of the parties ... are bound to be important factors."); *Dickson v. Dickson, [1990] CSIH 692; (1990) S.C.L.R. *1 (Scot.)* (intention of the parents of a young child determines habitual residence); *Cooper v. Casey, (1995) 18 Fam. L.R. 433 (Austl.)* (settled purpose of the parents determined habitual residence).

It is nonetheless clear, however, that foreign jurisdictions are receiving a consistent, and not a conflicted, message from the decisions of the Circuits in this country; parental intent is an important factor in the determination of habitual residence under the Hague Convention, particularly in cases involving young children. A grant of certiorari in this case is unnecessary to further inform the United States' sister signatories.

C. THE SECOND CIRCUIT'S STANDARD AND ITS FOCUS ON PARENTAL INTENT FURTHERS THE GOALS OF THE HAGUE CONVENTION, ESPECIALLY IN CASES, AS HERE, INVOLVING VERY YOUNG CHILDREN

The standard Petitioner seeks to employ effectively ignores Respondent's role as the children's primary custodial parent – indeed, their *sole* custodial parent for most of 2009 – and would result in the Children returning to Switzerland with the

parent who abandoned them for nine months to reside, herself, in the United States.

For most of 2009, Respondent was the *only* family the Children had in Switzerland. Their "family environment," therefore, was with Respondent – wherever that was. *See Pielage v. McConnell,* 516 F.3d 1282, 1289 (11th Cir. 2008). Their mother and their paternal grandparents, with whom they resided each time they returned to the United States and upon whom both parties relied to help care for the Children, were all in this country. The district court took specific note of the close bond the family had to Respondent's parents in finding that they had not abandoned the United States as their habitual residence (Pet. 23a).

It would be contrary to the goals of the Convention as well as to the best interests of the Children to invoke a standard that gave no consideration to such factors as the parents' intentions regarding where (and with whom) their children would be raised. Indeed, one of the goals of the Convention is to prevent "the possibility of individuals establishing legal and jurisdictional links which are more or less artificial." Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention, in* ACTES ET DOCUMENTS DE LA QUATRORZIÈME SESSION, TOME III (1980), ("Pérez-Vera Report"), 429. One could not imagine a more "artificial" jurisdictional link than Petitioner's to Switzerland.

Petitioner's reference to the 2006 Special Commission Report on the Child Abduction Convention (Petition, p. 29), mischaracterizes the Commission's findings, which in fact, stated that "[m]any experts agreed that the use of a strict definition for habitual residence would go against the spirit of the Convention, noting that habitual residence was above all a question of fact to be decided on a case-by-case basis, and should be distinguished from the more subjective concept of domicile." HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT ON THE FIFTH MEETING OF THE SPECIAL COMMISSION 45 (2006). Significantly, the Report goes on to point out that "Several experts indicated that this factual evaluation should include, to a certain extent, an examination of the common intent of the parents in establishing their residence." *Id.* at 45.

Here, the standard used to determine the habitual residence of the Children properly considered the parties' intentions as manifested by their actions. While it is the habitual residence of the child that the court is required to determine, it defies logic to assert, as Petitioner seems to, that the habitual residence of a young child can be different than that of *both* of its parents. Here, the district court properly rejected Petitioner's claim that *her* habitual residence was Switzerland, when she not only acknowledged her unhappiness there but repeatedly left that country (and the Children) to reside in the United States. Similarly, the district court properly rejected Petitioner's assertion that the

United States was Respondent's habitual residence, given his strong family ties in the United States, the temporary status of his residence in Switzerland and his stated intention to return here upon the completion of his Ph.D.

Thus, the goals of the Hague Convention are not contravened in any way by either the approach of the Second Circuit or the result reached in this case.

D. THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI SINCE NEITHER PARTY RESIDES IN SWITZERLAND OR INTENDS TO RESIDE THERE

Respondent and the Children have been residing in the United States since January, 2010, when their temporary residency permits expired. Petitioner has been residing in the United States since March 2010 and, like Respondent, no longer has a valid Swiss residency permit. Neither party has a job in Switzerland, owns property in Switzerland, has family in Switzerland or has any other ties to Switzerland. Moreover, as Petitioner has made clear (and as her counsel affirmatively represented to the Second Circuit), she lives here in the United States and has never wanted to reside in Switzerland. [8]

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[8] At oral argument before the Second Circuit, Petitioner's counsel, Neil VanderWoude, stated on the record (recorded in video by the court): "The [Petitioner] is living here. She never

Further, there is nothing in the record to suggest that Petitioner or the Children would be *able* to return to Switzerland should Petitioner in any subsequent proceeding be granted the relief she seeks in the Petition. Accordingly, there is no "live" case or controversy for the Court to resolve.

Moreover, the Appellate Division in New York recently held that the New York Supreme Court in which the Matrimonial Action has been pending for more than a year has custody jurisdiction, for reasons independent and apart from the district court's findings on habitual residence. *Heydt-Benjamin v. Heydt-Benjamin*, 2010-06133, slip op. 04420 (N.Y. App. Div. 2d Dep't May 24, 2011). This ruling by a court, which has entered interim custody and visitation orders, further complicates Petitioner's ability to get the result she seeks, even with this Court's intervention. *See Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007) (finding appeal from order dismissing Hague petition rendered moot in light of order entered in court having jurisdiction over the custody case).

Here, it is not clear Petitioner could obtain the result she seeks even with the intervention of this Court, making this case an improper one for certiorari. *See Ticor Title Ins. Co. v. Brown*, 511 U.S.117, 122 (1994) (dismissing a writ of certiorari as having been improvidently granted where, *inter alia*, it was "not clear that [the Court's] resolution of the

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wanted to live there [Switzerland], but that is not a requirement."

constitutional question will make any difference even to these litigants").

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

June 7, 2011

Respectfully submitted,

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IN THE

Supreme Court of the United States

AVA HEYDT-BENJAMIN,

Petitioner,

v.

THOMAS HEYDT-BENJAMIN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent does not seriously dispute that the circuits are split over the proper standard for determining a child's country of "habitual residence" under the Hague Convention. Nor does he dispute the importance of this issue, which is the often-litigated gateway determination in every Hague Convention case. Nor is the Convention's own importance subject to dispute. Thus, *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), presented the narrower question of whether a *ne exeat* right is a "right of custody" under the Convention. The Court called for the views of the Solicitor General on whether certiorari should be granted, and the United States urged this Court to grant review, including because of the recurring importance of litigation under the Convention. Because respondent's arguments against review are unpersuasive, certiorari should be granted.

1. Respondent essentially concedes that the circuits are split over the proper test for determining the child's habitual residence. *See* BIO 15, 17-18. His attempts to minimize the extent of the conflict are unpersuasive.

a. Respondent's statement that in the Second Circuit intent can "be overcome by a showing of other relevant factors," BIO 14, is not a fair characterization of that court's precedent, which refuses to consider factors other than shared parental intent absent proof that "serious harm to the child can be expected to result from compelling his return to the family's intended residence," Pet. App. 3a (quoting *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir.

2005)). Respondent identifies no case in which a court in the Second Circuit has found this exceptionally rigorous standard to be met. And indeed, petitioner's research reveals only three such cases in which the standard has even arguably been met in *all of* the jurisdictions that apply the same test as the Second Circuit. *Haro v. Woltz*, No. 10-C-389, 2010 U.S. Dist. LEXIS 85590, at *11 (E.D. Wis. Aug. 19, 2010); *Muhlenkamp v. Blizzard*, 521 F. Supp. 2d 1140, 1146, 1149 (E.D. Wash. 2007); *Lockhart v. Smith*, No. 06-cv-160-P-S, 2006 U.S. Dist. LEXIS 77424, at *9 (D. Me. Oct. 20, 2006). By contrast, in other circuits, factors other than intent *must* be considered, without having to meet this very high threshold.

b. The Sixth Circuit unquestionably would have reached the opposite result in this case because, as the petition explains, Pet. 15-17, all of the objective evidence regarding the children's perspective leads to the conclusion that Switzerland was their country of habitual residence at the time of the abduction. The children in this case had unquestionably been raised principally in Switzerland; in fact, one of them had never resided in the United States at all. Respondent fled with the children to this country only after his Swiss lawyer told him that there was a substantial chance that the Swiss courts would award petitioner custody of the children in the couple's *ongoing* Swiss custody proceeding, and the federal district court found accordingly that respondent abducted the children to engage in "forum shopping." Pet. App. 24a. But the lower courts deemed any facts regarding the children's circumstances to be irrelevant as a matter of law under the Second

Circuit's standard, which looks to the last shared intent of the parents as the effectively exclusive determinant of the child's habitual residence. *Id.* 3a, 14a.

Respondent's contrary assertion that the Sixth Circuit's "actual jurisprudence has been shifting to more closely match the dominant view," BIO 20, is inaccurate. As an initial matter, respondent does not seriously try to distinguish *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), in which the Sixth Circuit held that a child who was younger than petitioner's son and who had never lived in the United States was a habitual resident of Germany. Instead, respondent speculates only that the Second Circuit might have decided the case the same way because there was "no evidence that Mr. Friedrich ever intended to leave Germany." BIO 18. But this misses the point: the Sixth Circuit did not discuss Mr. Friedrich's intent only because that factor was irrelevant as a matter of law under its jurisprudence.

Nor have courts in the Sixth Circuit "chipped away" at that clear rule. *Contra* BIO 19. To the contrary, as the petition explained (at 12-13 & 18), the Sixth Circuit itself has repeatedly acknowledged the conflicting tests employed in other circuits but adhered to its view that parental intent plays no role in determining a child's habitual residence.

Respondent cites only district court decisions, and they do not call the Sixth Circuit's rule into question. *Maynard v. Maynard*, 484 F. Supp. 2d 654, 660 (E.D. Mich. 2007), found it "unnecessary to decide whether the parents' intent should be considered." Any discussion of the parents' intent was dictum illustrating that the court would have

reached the same result even if intent were considered.

McKie v. Jude, 2011 U.S. Dist. LEXIS 1834 (E.D. Ky. Jan. 7, 2011), reached the unremarkable conclusion that a child who had spent only one of twelve months of his life abroad was habitually resident in the United States. Although the court's habitual residence analysis suggested that judge's view that parental intent could play a role in cases involving newborns, the court also made clear that even under the purely objective *Friedrich* analysis, the child's "habitual residence would still be the United States." *Id.* at *45.

c. The Third and Eighth Circuits would also have ruled for petitioner. *See* Pet. 16-17. Those courts deem the child's perspective to be the focus of the habitual residence determination, *see* Pet. 13-15, but also allow consideration of parental intent as one of the factors in the habitual residence enquiry – a standard that cannot be reconciled with the Second Circuit's insistence that shared parental intent is presumptively dispositive.

Contrary to respondent's argument (BIO 21-22), the district court's finding here that the children had not "somehow become more Swiss than American" does not suggest that he would have prevailed in the Third or Eighth Circuit. The district court in this case was considering whether this was one of the rare cases in which the children were so acclimatized as to overcome the presumption in favor of parental intent. *See supra* at 1-2 (describing exceptionally rigorous standard that must be met to overcome presumption). But the Third and Eighth Circuits would never have started with such a presumption.

Those courts would instead undertake a broader inquiry, looking at "the settled purpose of the move to the new country from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country." *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010).

A decision issued by the Eighth Circuit after the filing of the petition vividly illustrates the conflict. In *Stern v. Stern*, 639 F.3d 449 (8th Cir. 2011), *pet. for reh'g pending* (filed June 3, 2011), the Eighth Circuit criticized precedent adopting the standard applied in this case, and it reiterated the "contrast" between the circuits' competing standards. *Id.* at *7 (reporter pagination not yet available). As in this case, the father in *Stern* argued that the parents' intent to eventually return home (to Israel) after the mother completed her Ph.D studies in Iowa rendered Israel the child's place of habitual residence. But the Eighth Circuit rejected that argument, explaining that even if "one or both parents intended to return [to Israel] eventually," the "parties maintained no home in Israel after coming to Iowa," the father closed down his business in Israel before "rejoining his family in the United States," and "[a]ny agreement of the pair to return to Israel would have involved staying in the United States for the indefinite amount of time it would take [the mother] to finish her doctorate." *Id.* at *9. Those facts cannot be fairly distinguished from this case, and the Eighth Circuit thus would have been compelled to deem Switzerland the country of habitual residence of these parties' children.

Although the Third Circuit alone grants additional weight to the parents' shared intent in cases involving extremely young children, *see* BIO 17, Pet. 14 n.4 (citing *Whiting v. Krassner*, 391 F.3d 540, 550-51 (3d Cir. 2004); *Delvoye v. Lee*, 329 F.3d 330, 332-34 (3d Cir. 2003)), the children in this case are not so young. Here, the children were two and four years old when respondent abducted them from Switzerland. They were involved in a play group and certainly were aware of their familial surroundings in Zurich.

d. The petition also demonstrated that, as in *Abbott v. Abbott*, certiorari is warranted because the question presented is also the subject of an established conflict among signatory nations to the Hague Convention. Respondent also does not contest the showing of *amici* that decisions of U.S. courts interpreting the Convention are an important influence on the decisions of other signatory states.

Respondent errs in denying the important role of foreign rulings in the certiorari determination because "[c]ourts of other countries have also consistently *looked to* the intent of the parents . . . in determining habitual residence under the Hague Convention." BIO 25 (emphasis added). Foreign rulings that "look to" the parents' shared intent as one relevant factor among many cannot be reconciled with the Second Circuit's general refusal to consider any other factor.

Respondent thus ignores the 2009 decision of the European Court of Justice holding that parental intent is just one factor to be considered in determining habitual residence, in addition to the child's objective experiences. *See* Pet. 29-30. As the

petition explained, that interpretation is binding on twenty-six European Union members, all of which are Hague Convention signatories – including England and Scotland, on whose decisions (circa 1989, 1990, and 1995) respondent relies. Thus, even to the extent that there is no consensus on the proper test for habitual residence, the current trend is much more accurately described as moving toward a child-centered approach that may include consideration of parental intent.

Even the decisions on which respondent relies provide scant support for his position. He cites the Australian High Court's decision in *L.K. v. Director-General*, (2009) 237 CLR 582, at *8 (Austl.), for the proposition that the "examination of a person's intentions will usually be relevant to a consideration of where that person habitually resides," BIO 25, but conveniently omits that court's statement – in the same case – that parental intent is "*not to be given controlling weight*" (emphasis added).

2. The Second Circuit's near exclusive reliance on the shared intent of the parents cannot be reconciled with the plain text of the Convention. The Convention applies when a "child" has been wrongfully removed from the country "in which the child was habitually resident immediately before the removal or retention." Pet. App. 88a (Article 3(a)). That language most naturally requires some degree of physical presence by the child in the place of habitual residence. *See* Pet. 25. But here, the parties' son had never lived in the United States, and their daughter had spent the majority of her life elsewhere. On respondent's contrary interpretation of the Convention, even if he had abducted the

children to Brazil, rather than the United States, the Second Circuit would deem the *United States* rather than Switzerland to be the children's habitual residence.

Respondent's contrary argument that the United States was the children's habitual residence relies principally on his own self-serving testimony (which the district court did not credit, *id.* 18a-19a, 23-24a) in an attempt to suggest that petitioner was less than devoted to her children (a claim the district court affirmatively rejected, *id.* 23a-24a). But in any event, the issue is the habitual residence of the children, not petitioner.

To the extent that respondent relies on the district court's finding that petitioner intended *eventually* to raise her children in the United States, *id.* 21a, 23a, that argument should have no bearing on where the children were habitually resident *at the time* respondent abducted them. Respondent's insistence, and the Second Circuit's conclusion, that a child has habitually resided in a place where he has never resided at all underscores the degree to which that court's test is divorced from the actual text of the Convention.

Respondent next argues that the Second Circuit's exclusive reliance on the shared intent of the parents would "further[] the goals of the Hague Convention," BIO 26, because it would allow the children to remain in the United States, where their father and grandparents now are, and where their parents intended them to live. The Convention embodies a judgment that the best interests of children collectively are served by returning wrongfully removed children to the country of their habitual

residence, so that courts in that country can resolve any disputes over custody. *Abbott v. Abbott*, 130 S. Ct. at 1995. Concerns about the child's welfare are resolved under other provisions of the Convention not at issue here.

Moreover, as a result of respondent's actions in abducting the child to secure a more sympathetic forum in the United States – which the district court characterized as "forum shopping," *see* Pet. App. 24a – there are now ongoing custody proceedings in two different fora, the United States and Switzerland. Once again, this is precisely the kind of conduct that the Convention seeks to deter. Further, the fact that the proceedings remain ongoing in the Swiss family court strongly suggest that the Swiss court regards itself as having jurisdiction over the case (which is in turn a good indicia that the children's habitual residence is in fact Switzerland).

3. Nor is there any credence to respondent's suggestion that certiorari is not warranted because both petitioner and respondent are now in the United States and – among other things – lack a "valid Swiss residency permit." BIO 29. Many of these purported obstacles to this Court's review are problems of respondent's own making: he no longer has a job in Switzerland, for example, because he abducted the children to the United States, which in turn forced petitioner to follow him. And the visa issue is just a straw man; there is no reason to believe that either parent would be unable to return to Switzerland for further proceedings in the family court there. *See* Passports & Visas, *available at* http://www.myswitzerland.com/en/travel/information/Entry/passport-visa.html (visited June 9, 2011)

("official website of Swiss tourism" explaining that, for U.S. residents, no visa required for stay of less than ninety days). Once again, the whole point of the Hague Convention is that a custody determination should be made by the courts in the child's country of habitual residence; respondent cannot cite these purported obstacles to preclude this Court from granting review to resolve the question of how a determination of habitual residence should be made.

Relatedly, respondent cannot plausibly argue that the children cannot be returned to Switzerland because they, along with petitioner and respondent, are in the United States and they have become attached to him, their grandparents, and the United States. Such an argument is precluded by the Convention. *See* Pet. App. 89a (Article 12 of the Convention allows, but does not require, judge to decline to order return of child who is "now settled in its new environment" only when petition for the child's return was filed more than a year after abduction – a scenario not present here). And with good reason: it perversely allows the abducting parent to benefit from his unlawful conduct. It would also place a left-behind parent such as petitioner in an impossible bind that the drafters of the Convention could not have intended.: she could risk waiving her Hague Convention claim by following the abducted children to the new country so that she can see them; or she could preserve the Convention claim by staying in the children's country of habitual residence, even if that residence is a continent away.

Nor does the recent decision by a New York intermediate appellate court somehow "complicate[] Petitioner's ability to get the result she seeks."

Contra BIO 30. As even respondent acknowledges, that decision is "independent and apart from the district court's findings on habitual residence," *id.*; all that the court did was to allow respondent's custody suit to move forward in state court. *See* Reply App. 1a-3a. Respondent certainly cannot invoke the mere existence of state-court custody proceedings as an excuse to prevent petitioner from obtaining this Court's review of the Second Circuit's decision. If this Court were to grant review and reverse, and on remand the district court were to hold that Switzerland was the children's habitual residence, the New York court's holdings on custody would be irrelevant.

The Tenth Circuit's decision in *Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007), on which respondent relies, *see* BIO 30, actually supports petitioner on this point. In that case, a mother appealed a district court decision granting the father's Hague Convention petition, which sought the child's return to England, on the ground that the father lacked sufficient "rights of custody" to trigger the Convention's protections. The Tenth Circuit dismissed the appeal as moot in light of a decision by a family court in England – which in that case was indisputably the child's country of habitual residence – making clear that the father enjoyed full rights of custody. The court reasoned that it would be unable to order any relief because, even if it were to agree with the mother that the district court decision was erroneous, the only remedy for the error "would be to order [the child's] return to the United States to be reunited with" his mother – a scenario specifically prohibited by the English custody order. Moreover,

the Tenth Circuit made clear, the very purpose of the Hague Convention is "[t]o defeat attempts to re-litigate custody matters in a foreign country" by "requir[ing] contracting states to respect custody orders issued by the country of the child's habitual residence and forbid[ding] contracting states from deciding anew the underlying merits of custody orders."

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari and *amicus* brief, certiorari should be granted.

Respectfully submitted,

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June 10, 2011

APPENDIX

APPENDIX

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

_____ AD3d _____ Argued – April 29, 2011

William F. Mastro, J.P.
L. Priscilla Hall
Plummer E. Lott
Jeffrey A. Cohen, J.J.

2010-06133 DECISION AND ORDER

Thomas Heydt-Benjamin, respondent,
v Ava Dawn Heydt-Benjamin, appellant.
(Index No. 2318/09)

Gerosa & Vanderwoude, Carmel, N.Y. (Neil Vanderwoude of counsel), for appellant.

Aronson Mayefsky & Sloan, LLP, New York, N.Y., (Allan E. Mayefsky, Heidi Harris, and Sherri Sharma of counsel), for respondent.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by her brief, from so much of an order of the Supreme Court, Putnam County (Nicolai, J.), dated June 2, 2010, as granted

the plaintiff's motion for temporary custody of the two subject children, denied that branch of her cross motion which was to dismiss the complaint for lack of subject matter jurisdiction, and, in effect, denied that branch of her cross motion which was for an award of pendente lite maintenance and an attorney's fee.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Contrary to the defendant's contentions, this action for divorce may properly be maintained in New York (*see* Domestic Relations law § 230), since New York is the domicile of the plaintiff (*see Guedes v Guedes*, 45 AD3d 533, 534-535; *Unanue v Unanue*, 141 AD2d 31, 34-35; *Laufer v Hauge*, 140 AD2d 671; *Manasseri v Manaserri*, 121 AD2d 697, 699).

Furthermore, the New York Courts have jurisdiction to hear the custody matter pursuant to Domestic Relations Law § 76(1)(b) (*see Warshawsky v Warshawsky*, 226 AD2d 708; *Charpentier v Charpentier*, 98 AD2d 740).

The Supreme Court properly granted the plaintiff continued temporary custody of the parties' two children in accordance with their best interests (*see Eschbach v Eschbach*, 56 NY2d 167, 173; *Ekstra v Ekstra*, 78 AD3d 990). On the facts presented, the Supreme Court was not required to conduct a hearing, and the parties would best be served by proceeding towards a speedy trial (*see e.g. Kehoe v Kehoe*, 234 AD2d 272).

The Supreme Court properly, in effect, denied that branch of the defendant's cross motion which was for an award of pendente lite maintenance and an attorney's fee. Pendente lite maintenance awards should be an accommodation between the reasonable

needs of both parties (*see Mueller v Mueller*, 61 AD3d 652; *Ryan v Ryan*, 186 AD2d 245). Here, neither party is the monied spouse, and the plaintiff is paying expenses for the parties' children. Under the circumstances, a pendente lite award of an attorney's fee (*see* Domestic Relations Law § 237[a]) was also properly denied (*see O'Shea v O'Shea*, 93 NY2d 187, 190; *Prichep v Prichep*, 52 AD3d 61, 65; *Morrissey v Morrissey*, 259 AD2d 472).

The defendant's remaining contentions are without merit.

MASTRO, J.P., HALL, LOTT, and COHEN, J.J., concur.

ENTER:
Matthew G. Kiernan
Clerk of the Court

MOTION FILED
MAY 19 2011

No. 10-1303

In the Supreme Court of the United States

AVA HEYDT-BENJAMIN,

Petitioner,

v.

THOMAS HEYDT-BENJAMIN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF PROFESSORS LINDA D. ELROD AND ROBERT G. SPECTOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to this Court's Rule 37.2(b), Professors Linda D. Elrod and Robert G. Spector move to file the accompanying brief in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief but counsel for respondent has not.

The issue presented by the petition—how to determine a child's "habitual residence" under the the Hague Convention on the Civil Aspects of Child Abduction, T.I.A.S. No. 11670 ("Convention" or "Child Abduction Convention"), implemented in the United States in 1988 through the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611—has profound consequences for the prevention of child abduction across international borders. The Convention and ICARA provide that a child who has been abducted across international borders must be returned to the country that is his "habitual residence." Child Abduction Convention art. 1. Once the child has been properly relocated, it is the responsibility of the judicial system of the state of his "habitual residence" to adjudicate the parents' competing claims for rights of custody and access. 42 U.S.C. § 11601(b)(4). This process fulfills the Convention's central purpose of protecting the child's best interests by deterring parents from "removing children to jurisdictions more favorable to their custody claims." *Gitter* v. *Gitter*, 396 F.3d 124, 129 (2d Cir. 2005).

Amicus Professor Elrod was the Reporter for the Uniform Child Abduction Prevention Act, *available at* http://www.law.upenn.edu/bll/archives/ulc/ucapa/2006_finalact.htm; has written a national treatise, *Child Custody Practice and Procedure* (2009), on child custody; and has written numerous articles on child advocacy, child representation, and high-conflict custody cases. She has also served as Editor-in-Chief of the American Bar Association Family Law Section's *Family Law Quarterly* since 1992.

Amicus Professor Spector has been a member of the United States delegation to the Hague Conference on Private International Law for the negotiation of family law treaties since 1994 and is also the Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1997). His Guide to United States Practice Under the Abduction Convention will be published in the 2011 Yearbook of Private International Law.

Amici have a longstanding interest in the interpretation and enforcement of the various Hague Conventions governing child custody and domestic laws enforcing them. They also have a strong interest in persuading this Court to grant review in this case in order to make uniform the approach American courts take to threshold "habitual residence" decisions under the Convention. The present conflict among the circuits and state supreme courts creates opportunities for forum shopping and encourages child abduction.

Amici's brief makes two arguments that do not appear in the petition itself. First, since the Convention affects the United States more than any other nation, conflict among American courts greatly

undercuts the overall administration of the Convention. And because non-American courts rely on American decisions in developing their own law, domestic conflict here unsettles the development of uniform standards elsewhere.

Second, each of the lower courts' conflicting approaches weighs evidence regarding a child's habitual residence in significantly different ways. Consequently, a parent's decision regarding where to relocate with a child within the United States (and therefore where to file a petition in the United States) is often outcome-determinative, which directly contravenes the uniformity that the Hague Conference intended in developing the Convention and that Congress intended in passing ICARA.

For these reasons, *Amici* should be granted leave to file the attached brief and this Court should grant review.

Respectfully submitted.

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May 2011

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Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 Colum. Hum. Rts. L Rev. 275 (2002) 6

INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any other party and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for respondent received timely notice of *amici*'s intent to file this brief pursuant to Rule 37.2(a) but has not consented to its filing. Counsel for petitioner received timely notice and has consented.

Amici file this brief in their individual capacities and not as representatives of the institutions with which they are affiliated.

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Amici have a longstanding interest in the interpretation and enforcement of the various Hague Conventions governing child custody and domestic laws enforcing them.

SUMMARY OF ARGUMENT

The Hague Convention on the Civil Aspects of Child Abduction, T.I.A.S. No. 11670 ("Convention" or "Child Abduction Convention"), implemented in the United States in 1988 through the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11611, provides that a child who has been abducted across international borders must be returned to the country that is his "habitual residence." Child Abduction Convention art. 1. Once

the child has been properly relocated, it is the responsibility of the judicial system of the state of his "habitual residence" to adjudicate the parents' competing claims for rights of custody and access. 42 U.S.C. § 11601(b)(4). This process fulfills the Convention's central purpose of protecting the child's best interests by deterring parents from "removing children to jurisdictions more favorable to their custody claims." *Gitter* v. *Gitter*, 396 F.3d 124, 129 (2d Cir. 2005).

Identifying an abducted child's habitual residence is therefore a threshold inquiry in every case arising under the Hague Convention. Yet despite its importance, "habitual residence" is not expressly defined in either the Convention or ICARA. *Koch* v. *Koch*, 450 F.3d 703, 712 (7th Cir. 2006). Consequently, the nine federal courts of appeals that have addressed how to determine a child's habitual residence have, as petitioner describes, Pet. 9-12, developed three starkly different approaches. That "considerable confusion," *Holder* v. *Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004), breaks down as follows: six courts of appeals (the First, Second, Fourth, Seventh, Ninth and Eleventh Circuits) presume that the parents' shared intentions are dispositive, Pet. 9-10; the Sixth Circuit considers only the child's past objective experiences in determining his habitual residence, *id.* at 10-11; and the Third and Eighth Circuits have adopted a hybrid approach incorporating both of these factors, *id.* at 11-12.

This entrenched circuit conflict requires this Court's intervention for at least two reasons. First, since the Convention affects the United States more than any other nation, conflict among American

courts greatly undercuts the overall administration of the Convention. And because non-American courts rely on American decisions in developing their own law, domestic conflict here unsettles the development of uniform standards elsewhere.

Second, each of these approaches weighs evidence regarding a child's habitual residence in significantly different ways. Consequently, a parent's decision regarding where to relocate with a child within the United States (and therefore where to file a petition in the United States) is often outcome-determinative. See *infra*, pp. 12-14. This inconsistency directly contravenes the uniformity that the Hague Conference intended in developing the Convention and that Congress intended in passing ICARA. See 42 U.S.C. § 11601(b)(3)(B) ("In enacting this chapter, Congress recognizes the need for uniform interpretation of the [Hague] Convention."). Encouraging domestic forum-shopping, in turn, facilitates child abduction—the primary evil the Convention aims to suppress. See *Mozes* v. *Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (Hague Convention incorporates term "habitual residence" to prevent forum-shopping and promote uniformity, since it allows determination of the child's habitual residence without using "the idiosyncratic legal definitions of domicile and nationality of the forum where the child happens to have been removed.").

REASONS FOR GRANTING THE PETITION

I. Because More Hague Convention Cases Concern The United States Than Any Other Country And Other Nations Look To American Courts' Interpretation Of The Convention To Help Determine Its Meaning, This Court Should Settle The Deep Conflict Among American Courts

A. The Hague Convention provides the primary means for addressing the wrongful removal or retention of children across national borders. At present, 85 nations are signatories to the Convention. Hague Conference, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Apr. 19, 2011). Both in raw numbers and relative to population, however, the number of wrongful removal and retention cases under the Convention varies widely from country to country. See Hague Conference, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("*Hague Analysis*") 13, Prelim. Doc. No. 3, pt. I (Sept. 2008), *available at* http://www.hcch.net/upload/wop/abd_pd03e1_2007.pdf (documenting the number of applications that each member State has received in a recent year).

By every major metric, the United States is the country most affected by the Convention. In 2003, member nations collectively received 1497 applications for return of or access to children; 345 of these were received by the United States. *Hague Analysis*, *supra*, at 10-11. That is, 23% of all global applications involve the United States—far more

than any other nation. The United States also made the most requests for return or access under the Convention (13% percent of all such requests). *Id.* at 16. That same year, almost 250 American parents were involved in Convention proceedings in the United States. See *Hague Analysis*, *supra*, at 485-487, Prelim. Doc. No. 3, pt. II (Sept. 2008), *available at* http://www.hcch.net/upload/wop/abd_pd03ef2007.pdf.

American courts' dockets reflect the growing impact of Hague Convention proceedings. Federal court decisions involving abduction issues under the Convention have "recently increased dramatically." Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 Colum. Hum. Rts. L. Rev. 275, 276-277 (2002). The official Hague Convention database lists 874 "significant [global judicial] decisions concerning the Convention."[2] Hague Conference, *The International Child Abduction Database (INCADAT) Guide for Correspondents* (2001), *available at* http://www.hcch.net/upload/incadat_guide.pdf. Federal and state courts in the United States are responsible for 123 of these decisions.[3] In addition, American courts decide many less "significant," but nonetheless important,

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[2] The INCADAT database itself is available at http://www.incadat.com.

[3] The database lists 85 cases under "federal jurisdiction," 33 cases under "state jurisdiction," and 5 cases under "general United States jurisdiction." All the cases in this final category were decided by federal courts.

Hague cases every year. The Convention thus affects the United States more than any other country both in terms of nationals as parties and the number of cases in its courts.

B. Given the significant role the United States occupies with respect to the Convention, American judicial decisions interpreting it—including those addressing the meaning of "habitual residence"—have particular influence on other courts across the world. In the past decade alone, for example, courts in Australia, Canada, Israel, New Zealand, South Africa, and the United Kingdom have cited United States appellate opinions interpreting various provisions of the Convention. See, *e.g.*, *MW* v. *Director-General* [2008] HCA 12 (Austl.); *Wilson* v. *Huntley*, [2005] 138 A.C.W.S. (3d) 1107 (Can. Ont. Sup. Ct. J.); FamC (TA) 046252/04 *Ploni* v. *Almonit* [2005] (not reported, 13.1.05) (Isr.)[4]; *Sonderup* v. *Tondelli*, 2001 (1) SA 1171 (CC) ¶¶ 22-23 (S. Afr.) (citing then-Judge Sotomayor's dissent in *Croll* v. *Croll*, 229 F.3d 133, 146 (2d Cir. 2000)); *P* v. *Sec'y for Justice*, [2004] 2 N.Z.L.R. 28 (C.A.); *Re D*, [2006] UKHL 51, [2007] 1 A.C. 619 (U.K.). Uniformity of American law thus matters far beyond the borders of the United States.

The conflict among American courts regarding how to determine "habitual residence" has not gone unnoticed. Some non-American courts follow the child-centered approach, while others adhere to the parental-intent approach. Australia's highest family

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[4] An English-language summary of *Ploni* is available at http://www.incadat.com/index.cfm?act=search.detail&cid=806&lng=1&sl=2

court has approved a trial judge's express application of the Sixth Circuit's child-centered test. See *Cooper* v. *Casey* (1995) 18 Fam. L.R. 433 (Austl.). Adding to the confusion, the High Court of Australia has recently taken a slightly different approach. See *LK* v. *Director General*, (2009) 237 CLR 582 ¶ 28 (Austl.) (parental intent "not to be given controlling weight"). And an Israeli judge—citing Ninth Circuit precedent—has applied the parental-intent standard to conclude that children who lived their entire lives in Venezuela and Paraguay became habitual residents of Israel during a two-month vacation. See *Ploni*, FamC (TA) 046252/04.

Non-American courts' use of American law exceeds mere citation. In *Secretary for Justice*, for example, New Zealand trial and appellate courts disagreed over how to apply the Ninth Circuit's decision in *Mozes* v. *Mozes*, 239 F.3d 1067 (9th Cir. 2001). Quoting *Mozes*, the trial court decided that "the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period" and therefore "refused to find that the changed intentions of one parent led to an alteration in the child's habitual residence." *Sec'y for Justice*, 2 N.Z.L.R. 28 ¶ 129 (quoting *Mozes*, 239 F.3d at 1077). On appeal, Justice Glazebrook noted an inconsistency in *Mozes*, carefully distinguished the facts of that case from the ones before the court, and chastised the trial judge for mechanically applying *Mozes* "without a consideration of the factual matrix." See *id.* ¶¶ 130-132.

Courts outside the United States have also recognized the domestic and international disruptions that circuit splits within the United States

over interpretation of the Hague Convention can produce. In a recent opinion concerning the meaning of "rights of custody" under the Convention, Lord Hope of Craghead wrote extensively about the "mischief" caused by the Second Circuit's outlier approach to that issue and lamented the "profound difference of view between some, although not all, of the courts in North America and the view so widely adopted elsewhere in the common law world." *Re D*, 1 A.C. at 628-630. To remedy this problem, Lord Hope encouraged other courts to follow the dissenting views expressed by then-Judge Sotomayor in *Croll*, 229 F.3d at 1070. See 1 AC at 629.

Given the influence of United States law on other jurisdictions' interpretations of the Convention, this Court's intervention would not only resolve the split among the federal circuits and state supreme courts but would also help unify the law elsewhere. On matters of international significance, the opinions of this Court "are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois." See Justice Sandra Day O'Connor, *Remarks at the Southern Center for International Studies* 2 (Oct. 28, 2003) (transcript available at http://www.southerncenter.org/OConnor_transcript.pdf) (quoting Anthony Lester QC, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 541 (1988)). As a result, this Court's guidance would redound to the benefit of our sister signatories generally and, in particular, to United States parents whose custody disputes arise in other nations.

II. The Three-Way Circuit Split Over How To Determine A Child's Habitual Residence Results In Greatly Inconsistent Application Of The Convention And Encourages Child Abduction

A. The choice of habitual residence test is largely determinative of where a child will continue to live. A simple example illustrates the point: A husband and wife living in the United States with their three-year-old daughter decide to move to Munich, Germany, where the husband has just accepted a job for four years. At the time of the move—which the wife agreed to make only reluctantly—they were both open to the possibility of staying in Germany after the husband's job ended. Neither had a well-formed intention to move back or not to the United States, but they also were not certain that they would want to stay in Germany. The parents' domicile, in other words, remained the United States, but Germany became the family's residence.

For four years, the parents raised their daughter there. They took her on weekly strolls around the English Garden. She enjoyed regular playdates with friends from school and swam with a local children's group during the summers. By age seven, her favorite foods had become bratwurst and potato cakes with applesauce. From the daughter's point of view, Germany was not just her "residence." It was her home. And she wanted to stay there.

As the father's four-year work assignment wound to an end, the parents disagreed about whether the family should remain in Germany—and much else too. The mother, seeing the rich life that had been made for her child in Germany, wanted to keep their

home there. But the father insisted on returning to the United States and looking for a job there. They argued repeatedly over where to live and reached no agreement. One day while the mother was out, the father took the child to the airport and purchased two tickets to the United States. Upon arriving in the United States, the father informed the mother that he would file for divorce and not allow the daughter to return to Germany.

Whether the abducted daughter reunites with her distraught mother or the father's gambit pays off would depend on the United States forum in which the mother relocates with the child and brings a Hague Convention action. A federal district court in Ohio, for example, would apply the Sixth Circuit's child-centric test and conclude that the daughter's habitual residence at the time of the move was Germany. It would conduct a fact-intensive inquiry into the child's objective past experiences, *Friedrich* v. *Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993), and determine that she had "been present long enough [in Germany] to allow acclimatization" and that her "presence [there] ha[d] a degree of settled purpose from her perspective," *Jenkins* v. *Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009) (internal citation omitted). Factors indicating such acclimatization would include the child's attendance at school, "social engagements, participation in sports programs and excursions, and meaningful connections with the people and places in the child's new country." *Robert* v. *Tesson*, 507 F.3d 981, 996 (6th Cir. 2007) (internal citation omitted). Under this approach, the parents' last shared subjective intention as to where the child would live long term would be "irrelevant." *Friedrich*, 983 F.2d at 1401. The court would grant

the mother's petition, and child custody proceedings would occur in Germany.

If the mother filed her petition in any of the six circuits that focus only on the parents' last shared intent (unless "unequivocal" evidence showed that the child has acclimatized elsewhere), see Pet. 9-10, she would lose. Because the parents' "last shared intent"—shared no more recently than four years earlier—was to remain in the United States, the daughter's habitual residence would be here. That neither parent had certainly intended to return to the United States and that the daughter preferred Germany would not be "unequivocal" evidence to the contrary. Cf. *Poliero* v. *Centenaro*, 373 Fed. Appx. 102 (2d Cir. 2010); *Gitter* v. *Gitter*, 396 F.3d 124 (2d Cir. 2005); *Ruiz* v. *Tenorio*, 392 F.3d 1247 (11th Cir. 2004). The father would be rewarded for abducting the daughter, who would be uprooted from the only place she had ever really known as home.

Filing the action within the Third or Eighth Circuits would result in the daughter's return to Germany. These circuits employ a hybrid approach to determining a child's habitual residence that "focuses on the child, but also * * * consider[s] the parents' present, shared intentions." *Tsai-Yi Yang* v. *Fu-Chiang Tsui*, 49 F.3d 259, 272 (3d Cir. 2007); *Barzilay* v. *Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010). In this inquiry the child's perspective is highly significant—reflecting "the text of the Convention [which] points to the child's, not the parents', habitual residence," *Silverman* v. *Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) (citing Child Abduction Convention art. 3), as well as "the primary objective of the Hague Convention: to ensure

stability in a child's family and social environment." *Karkkainen* v. *Kovalchuk*, 445 F.3d 280, 291 (3d Cir. 2006). Like the Sixth Circuit, these circuits consider whether the child has acclimatized to a country by examining the child's past experiences and conduct. *Id.* at 292. The court must then also analyze the parents' subjective intentions but accords them significantly less weight than the child's experiences. *Silverman*, 338 F.3d at 898 ("[W]e agree with the Third Circuit that one spouse harboring reluctance during a move does not eliminate the settled purpose from the children's perspective").

B. Such an example vividly illustrates the significance of which test a court applies, and the case law bears that out. Consider *Roche* v. *Hartz*, No. 1:10-CV-1819, 2011 WL 841556 (N.D. Ohio Mar. 7, 2011), decided only two months ago. An American mother and Australian father had two children during the decade they lived in Australia. The parents agreed that the children could accompany the mother on a strictly temporary visit to the United States to help relocate the mother's ailing parent. *Id.* at *1. In an e-mail to friends explaining the visit, the mother wrote that "[w]e intend to stay [in America] for a year, but will give it 6 months[, and] if it is too hard I will return." *Ibid.* The father agreed to temporary extensions of the trip on the mother's promise that "she still intended to eventually reunite the family in Australia." *Id.* at *2. But when the father arrived in America to help "prepare his family for their move back to Australia" he was "greeted by a process server, who served him with divorce papers." *Id.* at *3. The court noted that it could not consider the parents' last shared intentions under Sixth Circuit precedent. *Id.* at *7.

It then concluded that the children had acclimatized to the United States because they attended school and church, participated in extracurricular activities, and developed relationships with friends and cousins there. *Id.* at *6-7. The record was unequivocal, however, that the parents' last shared intention was for the children to live in Australia, *id.* at *2-3, leaving little doubt that Australia would have been the habitual residence in those many circuits in which the parents' last shared intention is effectively dispositive.

Consider as well *Feder* v. *Evans-Feder*, 63 F.3d 217, 219-220, 224 (3d Cir. 1995). Two American parents moved to Pennsylvania with their three-month-old son in October 1990. *Id.* at 218. They lived there together until the end of October 1993, when the father moved to Australia to begin a new job. *Id.* at 219-220. The mother had "deep misgivings" about her marriage and the move and remained with the child in the United States for several months. *Id.* at 219. But "for both emotional and pragmatic reasons"—and "[w]ith great reluctance [and] without any commitment to remain in [Australia], in a last attempt to save her troubled marriage"—the mother and her son moved to Australia in January 1994. *Ibid.*

While in Australia, the son attended nursery school three days a week. 63 F.3d at 219. The mother never changed her driver's license and never "submit[ted] to the physical examination or sign[ed] the papers required of those seeking permanent residency status. All of the Feders[, however,] obtained Australian Medicare cards, giving them access to Australia's health care system." *Ibid.*

The marriage worsened. "Ultimately, Mrs. Feder decided to leave her husband and return to the United States with [her son]." *Ibid.* Believing that her husband would not consent to her return with the son if he knew her plans, she told him that she wanted to travel back to the United States to visit her parents. *Id.* at 219-220. She left with the child on June 29, 1994, and the following month, when her husband made a trip to the United States, she had him served with divorce and custody papers. *Id.* at 220. He then filed a petition for return of the child to Australia.

Both parties agreed that the son's habitual residence had been the United States until at least January, 1994. *Feder* v. *Evans-Feder*, 866 F. Supp. 860, 865 (E.D. Penn. 1994), *rev'd*, 63 F.3d 217 (3d Cir. 1995). The question was "whether the time [the son] spent in Australia, which was slightly less than six months, altered this status." 866 F. Supp. at 865. The district court, citing the Sixth Circuit's child-centric test with approval, *id.* at 864 (citing *Friedrich*, 983 F.2d at 1401), held that the six-month stay had not changed the child's habitual residence. It rejected the father's claims that the child had become settled in Australia, 866 F.3d at 866-868, and noted that the child's parents "viewed Australia differently during the short time they were there." *Id.* at 868. "Mr. Feder may have considered and even established Australia as his habitual residence by June of 1994 despite his history of frequent relocation," the court explained, "but Mrs. Feder assuredly did not." *Ibid.*

The Third Circuit reversed. The panel majority applied a hybrid approach. 63 F.3d at 224. The

parents, it noted, "both agreed to move to [Australia] and live there with one another and their son, and did what parents intent on making a new home for themselves and their child do–they purchased and renovated a house, pursued interests and employment, and arranged for [the child's] immediate and long-term schooling." *Ibid.* The district court, it commented, had "placed undue emphasis on the fact that the majority of [the child's] years had been spent in the United States" and "disregarded the present, shared intentions" of the parents. *Ibid.*

Judge Sarokin dissented. He noted that the court's holding would cause "the child [to] be taken from his mother's home in Jenkintown, [Pennsylvania,] where he has spent virtually all of his years, in contrast to the time spent with his father in Australia." 63 F.3d at 231 (Sarokin, J., dissenting). He also noted "that there is a temporal element to th[e] inquiry. For example, two weeks in Australia certainly would not [have] suffice[d] for [the son] to [have] establish[ed] a habitual residence there, and after two years his mother would have been hard put to argue that [Pennsylvania] remained his home." *Id.* at 230. Given these facts, a court applying the child-centric approach would surely conclude that the United States, not Australia, was the child's habitual residence.

Finally, consider *Ruiz* v. *Tenorio*, 392 F.3d 1247 (11th Cir. 2004). In *Ruiz*, the mother—an American citizen—gave birth to her first child in the United States in 1992. *Id.* at 1249. The father—a Mexican citizen—relocated to the United States and married the mother shortly thereafter. *Ibid.* The couple had their second child in 1998. *Ibid.* After experiencing

some marital difficulties, the couple moved to Mexico in 2000 with their two- and eight-year-old children to try to save their marriage. *Ibid.* Both parents intended this move to be "conditional"—that is, "if it did not work out, the family would move back" to the United States. *Id.* at 1249, 1254. The father moved nearly all of the family's possessions to Mexico and the mother and children obtained tourist visas. *Id.* at 1249. During the next nearly three years, the children continuously attended school in Mexico and developed friendships with Mexican children. *Id.* at 1255. The mother and children visited the United States only twice. *Id.* at 1250. On these visits, the mother opened a bank account and obtained a nursing license in Florida because she "planned on returning." *Ibid.* (internal quotation marks omitted). In May 2003, the mother took the children back to the United States and refused to return them to the father in Mexico, who then filed a petition for wrongful removal. *Ibid.*

The Eleventh Circuit adopted the Ninth Circuit's last-shared-intention test and denied the father's petition. 392 F.3d at 1252-1254. It concluded that the parents never had a shared intention to "abandon the prior United States habitual residence." *Id.* at 1254. Instead, the mother's intention was "clearly conditional." *Ibid.* The mother's decision to retain financial accounts in the United States, have her mail forwarded to an American address, and obtain a nursing license in the United States all bolstered the court's conclusion. *Ibid.* The court did note that "a number of objective facts point toward Mexico. The family did move there. [The husband] did undertake employment. A new house was being built for them. The sojourn in

Mexico was of considerable length." *Id.* at 1255. These facts did not, however, "point unequivocally to a change," *ibid.*, the high standard for overcoming the presumption that the parents' last shared intention controls.

Both the hybrid approach and the Sixth Circuit's child-centric approach would have resulted in the father's petition being granted. At the time of the allegedly wrongful removal, the couple's eleven- and five-year-old children had lived in Mexico for nearly three years. *Ruiz*, 392 F.3d at 1250; cf. *Feder*, 63 F.3d at 224 (holding that six months of time to acclimate to new surroundings is a "significant period of time for a four-year old child"). During their time in Mexico, they had attended Mexican schools and formed friendships with Mexican children. 392 F.3d at 1255. Moreover, the children's paternal grandfather was building a new house in Mexico for the family. *Ibid.* Indeed, the Sixth Circuit itself expressly recognized that this circuit split was outcome-determinative in *Ruiz*, noting that the children's "habitual residence" would be Mexico under a child-centric approach. *Tesson*, 507 F.3d at 991 (comparing how the children's "habitual residence" in *Ruiz* would differ under the competing approaches of the circuit split); see also *ibid.* ("The [last-shared-intention approach] is not only inconsistent with this Court's precedent, but * * * it has 'made seemingly easy cases hard and reached results that are questionable at best.' In *Ruiz* * * *, for example, the Eleventh Circuit applied [the Ninth Circuit's approach] and reached just such a result.") (quoting *Koch* v. *Koch*, 416 F. Supp. 2d 645, 651 (E.D. Wis. 2006), *aff'd on other grounds*, 450 F.3d 703 (7th Cir. 2006)).

These outcomes differ precisely because the parents' last-shared-intention test permits the parents' desire to be overcome only in the "rare" circumstance of "complete" acclimatization. *Daunis* v. *Daunis*, 222 Fed. Appx. 32, 34 (2d Cir. 2007); see also *Mozes*, 239 F.3d at 1079 (holding that "courts should be slow to infer [from evidence of the child's acclimatization] that an earlier habitual residence has been abandoned"). The child-centric approach, however, makes its sole focus the child's acclimatization, without regard to evidence of the parents' intention. *Jenkins*, 569 F.3d at 556 ("To determine the habitual residence, the court must focus on the child, *not the parents*, and examine past experience, *not future intentions*.") (emphasis added) (quoting *Friedrich*, 983 F.2d at 1401).

This lack of uniformity is likely to become more acute in the future. The United States has signed the Hague Convention 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391, a treaty primarily concerned with jurisdiction and judgments in international child custody cases. The primary jurisdictional basis under the treaty is the "habitual residence" of the child, *id.* at 1392, which, in accordance with Hague practices is not defined. When ratified, the 1996 Convention will be implemented through amendments to the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 ("UCCJEA"), which will have to be adopted by the states.

In the absence of guidance from this Court, lower courts will apply the conflicting case law of the Child Abduction Convention to give "habitual residence" in the UCCJEA meaning. This will undermine one of the primary goals of the 1996 Convention, which is to make clear that there is one and only one court where jurisdiction is appropriate in any particular child custody case. This confusion over the meaning of one of the UCCJEA's central terms will thus further exacerbate forum-shopping problems, because the determination of habitual residence will not only decide the issue of whether the child is to be returned under the 1980 Convention but also which court will have jurisdiction under the 1996 Convention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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